EXHIBIT H

Joint Comments of the League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities & SCAN NATOA, Inc.

In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, WT Docket No. 16-421

[appears behind this coversheet]

EXHIBIT H

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

IN THE MATTER OF Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Practices Mobilitie, LLC Petition for Declaratory Ruling	WT Docket No. 16-421

JOINT COMMENTS OF LEAGUE OF ARIZONA CITIES AND TOWNS, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, NEW MEXICO MUNICIPAL LEAGUE, LEAGUE OF OREGON CITIES & SCAN NATOA, INC.

Robert C. May III
Telecom Law Firm, PC
6986 La Jolla Blvd., Suite 204
La Jolla, CA 92027-5465
tripp@telecomlawfirm.com
619-272-6200

Javan N. Rad
Chief Assistant City Attorney
City of Pasadena
100 N. Garfield Ave., Room N-210
Pasadena, CA 91101
jrad@cityofpasadena.net
626-744-4141

Counsel for League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities and SCAN NATOA, Inc.

additional counsel listed on next page

Filed: March 8, 2017

EXHIBIT H

ADDITIONAL COUNSEL

League of Arizona Cities and Towns

Christina Estes-Werther
General Counsel
League of Arizona Cities and Towns
1820 W. Washington St.
Phoenix, AZ 85007
cwerther@azleague.org
602-258-5786

New Mexico Municipal League

Randall D. Van Vleck
General Counsel
New Mexico Municipal League
1229 Paseo de Peralta
Santa Fe, NM 87501
rvanvleck@nmml.org
800-432-2036

League of California Cities

Patrick Whitnell
General Counsel
League of California Cities
1400 K Street, 4th Floor
Sacramento, CA 95814
pwhitnell@cacities.org
916-658-8281

League of Oregon Cities

Sean O'Day
General Counsel
League of Oregon Cities
1201 Court Street NE
Suite 200
Salem, OR 97301
soday@orcities.org
503-588-6550

California State Association of Counties

Jennifer Henning
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814
jhenning@counties.org
916-327-7535

EXHIBIT H

TABLE OF CONTENTS

EXHIBIT H

EXHIBIT H

STATEMENT OF INTEREST OF LOCAL GOVERNMENTS

The League of Arizona Cities and Towns, League of California Cities, California State Association of Counties ("CSAC"), New Mexico Municipal League ("NMML"), League of Oregon Cities, and SCAN NATOA, Inc. ("SCAN") (collectively, "Local Governments") offers these comments in response to the Public Notice dated December 22, 2016, which sought comment on small cell siting practices and a Petition for Declaratory Ruling filed by Mobilitie, LLC.[1]

The League of Arizona Cities and Towns is a voluntary membership organization of the 91 incorporated cities and towns across the state of Arizona, from the smallest towns of only a few hundred in population, to the largest cities with hundreds of thousands in population. The League provides vital services and tools to its members, including representing the interests of cities and towns before the legislature and courts.

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians.

CSAC is a non-profit corporation whose membership consists of all of California's 58 counties. The mission of CSAC is to represent county government before the California Legislature, U.S. Congress, state and federal agencies and other entities, while educating the public about the value and need for county programs and services.

The NMML is a non-profit, nonpartisan corporation whose members are the incorporated municipalities of the State of New Mexico. All 106 New Mexico incorporated municipalities are

[1] *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421 (Dec. 22, 2016) [hereinafter "Public Notice"].

members of the New Mexico Municipal League. Its largest member has 10,000 times the population of its smallest, yet each member city casts one delegate vote in setting policy and electing officers. NMML staff and officers frequently appear before state agencies and legislative committees to testify on rules, regulations, and proposed legislation affecting municipalities in New Mexico.

The League of Oregon Cities, originally founded in 1925, is an intergovernmental entity consisting of Oregon's 242 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts.

SCAN has a history spanning over 20 years representing the interests of over 300 members primarily consisting of local government telecommunications officers and advisors located in California and Nevada. Accordingly, SCAN's members have a keen interest and stake in this proceeding and its outcome.

EXHIBIT H

I. INTRODUCTION

The Wireless Telecommunications Bureau (the "Bureau") should refrain from pursuing additional or more restrictive rules in this proceeding arising from Mobilitie's petition.[2] Instead, the Bureau should consider certain simplified reforms that will actually accelerate mobile broadband deployment, such as (1) starting the shot clock upon the tendering of a complete application; (2) dispensing with the 10-day resubmittal period; and (3) removing the limitations on subsequent incomplete notices.

Additionally, the Bureau should decline to interpret the provisions in 47 U.S.C. § 253 as proposed in the Petition and suggested in the Public Notice. Local Governments recommend that the Bureau take steps to encourage and facilitate more collaborative approaches to achieving robust small cell deployment, such as issuing a notice of inquiry and/or establishing joint task force to further consider the issues in this proceeding.

II. RESTRICTIONS PROPOSED IN THE PETITION AND SUGGESTED IN THE PUBLIC NOTICE WOULD HINDER INNOVATIVE AND COLLABORATIVE SOLUTIONS TO SMALL CELL DEPLOYMENTS

Mobilitie's Petition proposes new limitations on State and local authority over the public rights-of-way and the Bureau's Public Notice seeks comment on whether new limitations on local authority to review permit applications will accelerate wireless deployment. These proposals appear to be based on the erroneous assumption that carriers are not, at least in part, responsible for delays in their deployment. Without a proper distinction between proprietary and regulatory functions, or how applicant conduct contributes to delays, any new regulations by the

[2] *See In the Matter of Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way*, Petition for Declaratory Ruling, WT Docket No. 16-421 (Nov. 15, 2016) [hereinafter "Petition"].

Commission may limit, instead of encourage, innovative and collaborative solutions to small cell deployments in the public right-of-way.

State and local governments have property interests in (a) the public rights-of-way and (b) government-owned poles and other government-owned improvements within the public rights-of-way. This adds a proprietary dimension to the otherwise regulatory relationship between local governments and wireless carriers. Federal limitations on application review periods and compensation generally do not preempt States or local governments in their proprietary roles.[3] Mobilitie's Petition conflates local governments' proprietary and regulatory functions, and exaggerates Mobilitie's largely self-perceived and self-inflicted plight.

Additionally, significant delays in small cell deployment have arisen from applicant misrepresentations and misconduct. Even wireless industry members publicly acknowledge that aggressive and deceptive tactics by applicants, in particular those employed by Mobilitie, are among the primary impediments to deployment.[4]

New limitations on local regulatory authority will be unlikely to accelerate wireless facility deployment where (a) such limitations would not apply to decisions by State and local governments acting in their proprietary capacity, which is outside the Commission's preemptive authority; and/or (b) delays are caused solely or primarily by wireless applicants. Instead, existing regulations already create perverse incentives for applicants to "game" the shot clock to find shortcuts around local regulatory review altogether. To the extent that the Bureau

[3] *See, e.g.*, *Qwest v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) ("*Portland*") (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2nd Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

[4] Ernest Worthman, *Mini-cell Towers Shouldn't Be Passed as Small Cells*, AGL (Aug. 30, 2016), *available at*: http://www.aglmediagroup.com/mini-cell-towers-shouldnt-be-passed-as-small-cells/.

recommends revisiting the *2009 Declaratory Ruling* or the *2014 Infrastructure Order*, it should seek to eliminate incentives to flaunt legitimate local review.

A. Mobilitie's Petition and the Bureau's Public Notice Fail to Account for Distinctions between Regulatory and Proprietary Functions and Interests

Small cells and other right-of-way facilities differ from traditional macro cells in more ways than mere size. One difference that neither Mobilitie's Petition nor the Bureau's Public Notice appear to recognize is that State and local governments have property rights in the places and structures where small cells are commonly located – streets, sidewalks, light poles, traffic signals, bus shelters and other similar improvements in the public rights-of-way. As a consequence, State and local governments have an increasingly proprietary role (in addition to their regulatory role) in the deployment process as installations largely move from largely private property to spaces and structures owned by the State or local governments.[5]

Different small cell proposals can implicate different property interests. A proposed installation in the public rights-of-way may implicate the local government's *real property* interest in the land that comprises the public rights-of-way, its *personal property* interest in the government-owned improvements placed within the public rights-of-way or, in some cases, both. For example, if a wireless provider seeks to attach an antenna to a private (investor-owned) electric company's distribution pole, the local government may have a real property interest in generalized access to the streets for a commercial purpose, but would not likely have a personal property interest in that specific pole. On the other hand, the local government might have both a real property interest and a personal property interest if the proposal involved a city-owned streetlight in the public right-of-way.

[5] Although the Bureau's Public Notice describes federal law as it pertains to State and local government regulatory authority over wireless facilities, it does not contain any reference or acknowledgement that wireless facilities in the public rights-of-way often implicate State and local government proprietary interests. *See* Public Notice at 5–7.

Whether and to what extent local government may have a proprietary interest in the public rights-of-way also differs based on state law. Some states, such as Arizona, New Mexico and Oregon, grant municipalities the right to receive compensation from telecommunication service providers that use the municipality's real property, subject to certain limits.[6] Local governments may also be permitted to charge a separate fee for installations on their streetlights and other government-owned structures. Other states, like California, grant so-called "state-wide franchises" that prohibit local franchise fees for access to the real property in the public rights-of-way, but do not prohibit private proprietary agreements with telecommunications providers for attachments to municipally-owned structures within the public rights-of-way.[7]

The failure to appreciate these core distinctions between regulatory and proprietary functions can explain why firms like Mobilitie perceive costs and decisions timelines as unreasonable compared to their past experiences in a pre-small cell world.[8] The Bureau should recognize that the "barriers" alleged in Mobilitie's Petition stem from (a) Mobilitie's failure to recognize State and local property rights in the public rights-of-way; (b) the distinction between local regulatory functions and proprietary ones; and/or (c) the legislative framework that differs on a state-by-state basis.

---

[6] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-583(C) (authorizing an annual fee for undergrounded conduit on a linear-foot basis); N.M. STAT. ANN. § 62-1-3 (authorizing counties and municipalities to grant franchises, but limiting county franchise fees to "reasonable and actual costs" to grant and administer the franchise); OR. REV. STAT. § 221.515 (authorizing municipalities to collect up to a seven percent gross-revenues privilege tax).

[7] *See, e.g.*, CAL. PUB. UTILS. CODE § 7901; *Williams Commc'ns, Inc. v. Riverside*, 8 Cal. Rptr. 3d 96, 107–08 (Cal. Ct. App. 2003) (construing § 7901 as "a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration").

[8] See Iain Gillott, *Sprint's New Plan: Network Suicide*, LINKEDIN (Jan. 25, 2016), *available at*: https://www.linkedin.com/pulse/sprints-new-plan-network-suicide-iain-gillott (describing abandoned past attempts to site wireless facilities in the rights-of-way for various reasons related to property ownership).

1. Mobilitie's Petition Conflates Regulatory and Proprietary Fees in an Attempt to Invent an Economic Barrier for the Commission to Remove

The Bureau requested comment on Mobilitie's claim that it faces multiple, upfront and recurring fees.[9] Mobilitie improperly frames these costs as purely regulatory fees, and misstates the distinction between *proprietary* fees required to receive value for access to public/government property for its private/commercial use, and *regulatory* fees generally charged to recover the reasonable processing costs the government incurs to review and issue the permit to access the public rights-of-way.

With the proper distinction between proprietary rents and regulatory fees in mind, Mobilitie's attempt to inflate regulatory fees becomes obvious:

Application Fees. Mobilitie mischaracterizes inducements to negotiate and enter a license agreement to use government property with an application fee charged to review a proposed project and issue a permit to use the public rights-of-way. Although Mobilitie alleges that "a California city requested an $8,000 'administration fee,' but [did not] explain how it calculated that fee," the City of Antioch, California, requested a fee in that amount as a one-time sum to offset its costs to negotiate a master license agreement for installations on municipal streetlights, and also provided Mobilitie with invoice summaries from its legal counsel to "explain how it calculated that fee."[10] Under that agreement, the administration fee would not be required for each pole and was totally unrelated to any regulatory application fee. Moreover, the city intended the master license agreement to reduce overall regulatory burdens and accelerate small cell deployment by establishing a pre-approved site design for typical streetlights within that jurisdiction.

---

[9] *See* Public Notice at 13.
[10] Petition at 16.

Mobilitie also fails to recognize that whatever rights it may have to access or use the public rights-of-way do not also grant it rights to use third parties' personal property within the public rights-of-way. Local governments often own poles, streetlights, traffic signals, ducts, conduit and other chattel that may, in the owner's discretion (*i.e.*, not in their role as a right-of-way regulator), be leased or licensed to telecommunication providers for compensation negotiated at arms-length. On the other hand, the permit fees due for any project in the public rights-of-way are separate, but often still limited to cost.[11]

Per-Pole Fees. Mobilitie complains that "every locality is seeking a separate [per-pole] fee for each and every facility Mobilitie constructs," that "[t]hese fees do not serve to compensate the city for processing Mobilitie's applications" and that these fees "materially impair" its business model.[12] Even taking Mobilitie's statements about per-pole fees at face value, most – if not all – these fees are rents charged in the government's proprietary capacity and not subject to, controlled or limited by § 253.[13]

Mobilitie's assertions are incorrect because many local governments like those within California are prohibited by state law from charging state-certified telephone corporations (like Mobilitie) for access to the public rights-of-way.[14] While cities in California may charge telephone corporations a fee for access to poles owned by the government in its proprietary capacity, those cities do not (and cannot) charge a per-pole fee for attachments to third-party poles or new poles owned by the applicant. California cities could not force Mobilitie to use

---

[11] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-583(C); CAL. GOV'T CODE § 50030; N.M. STAT. ANN. § 62-1-3.
[12] *See* Petition at 16.
[13] *See, e.g.*, *Portland*, 385 F.3d at 1240.
[14] *See* CAL. PUB. UTILS. CODE § 7901; *T-Mobile W. LLC v. City and Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248, 260 (Cal. Ct. App. 2016) (review granted by California Supreme Court on 12/21/16, S238001) ("[C]ities may not charge franchise fees to telephone corporations for the privilege of installing telephone lines in the public right-of-way.").

government-owned poles – and thereby require a per-pole fee – because state law also prohibits local mandates to site all wireless facilities on property "owned by particular parties within the jurisdiction."[15]

Additionally, Mobilitie's assumption that fees charged for attachments to municipally-owned poles should be related to cost recoupment ignores the regulatory/proprietary distinction. While a "$10,800 annual per-pole fee" may exceed the additional costs imposed on the government in its regulatory capacity to permit and monitor the installation, such fees are proprietary fees that compensate local government for allowing the use of its property.[16] Indeed, if a local government did not charge a fee or receive some other value for the attachment or installation, that action (or inaction) could violate prohibitions on donations to corporations by government entities, found in some State constitutions.[17]

Lastly, market rates for access to municipal property for a commercial purpose does not "materially impair" the ability of entities to provide telecommunication services because service providers have other options within the public rights-of-way. For example, the Pole Attachment Act already enables firms like Mobilitie to attach their facilities to utility poles at cost-based rates.[18] In jurisdictions like California, state law prevents local governments from assessing charges that "exceed the reasonable costs" incurred by the government to issue a permit to construct their own poles.[19] These same options are open to all other providers. To the extent that Mobilitie's business model gambled on rent-free access to use state or local government-owned

---

[15] CAL. GOV'T CODE § 65964(c).
[16] *See* Petition at 16–17.
[17] *See, e.g.*, ARIZ. CONST., art. IX, § 7; CAL. CONST., art. XVI, § 6; N.M. CONST., art. IX, § 14.
[18] *See* 47 U.S.C. § 224.
[19] *See* CAL. GOV'T CODE § 50030; *Riverside*, 8 Cal. Rptr. 3d at 107–08.

property residing in the public rights-of-way, some commentators have opined that the economic "barriers" Mobilitie has encountered are self-inflicted.[20]

Gross-Revenue Fees. Mobilitie complains that fees based on its gross revenues "directly affect [its] ability to finance projects in those communities" that charge such fees.[21] With respect to Mobilitie's claims about Oregon and California cities, these claims lack both evidence and merit. Gross-revenue fees charged by Oregon local governments have survived legal challenges as fair and reasonable compensation.[22] The fact that Mobilitie's competitors, other wireless infrastructure providers, have operated in Oregon for years under the same percentage fees strongly weighs against Mobilitie's claim that those fees effectively prohibit telecommunications services.[23] Moreover, Mobilitie's claim about gross-revenue fee assessment in California could not possibly prevent its operations because such fees for access to the public rights-of-way would violate State law.[24]

[*space intentionally left blank*]

---

[20] *See* Gillott, *supra* note 8 (describing reasons why Sprint and Mobilitie's plan to decommission up to 80% of its macro sites and transition equipment to new and existing structures in the public rights-of-way is likely to fail); Dawn Chmielewski and Ina Fried, *Sprint Finalizes Plan to Trim Network Costs by Up to $1 Billion*, RE/CODE (Jan. 15, 2016, 9:44 AM), *available at*: http://www.recode.net/2016/1/15/11588832/sprint-finalizes-plan-to-trim-network-costs-by-up-to-1-billion (describing Sprint's business plan to cut expenses by transitioning its facilities from leaseholds on private property to streetlights and other government property where it assumed it will pay significantly less).

[21] *See* Petition at 18.

[22] *See, e.g.*, *City of Portland v. Elec. Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1072 (D. Or. 2005) ("Certainly, it is reasonable to base compensation on a percentage of revenue generated . . . ."); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1257–1259 (D. Or. 2002) (holding "the Cities' revenue-based fees are 'fair and reasonable compensation' . . . "), *rev'd on other grounds*, 385 F.3d 1236 (9th Cir. 2004), *aff'd*, *Qwest Corp. v. City of Portland*, No. Civ.01-1005-JE, 2006 WL 2679543 (Sept. 15, 2006).

[23] *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271–1272 (10th Cir. 2004) (finding that "fair and reasonable" should be evaluated under a totality of the circumstances test); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624–25 (6th Cir. 2000); *see also Sprint Tel. PCS, LP v. Cnty. of San Diego*, 543 F.3d 571, 576–77 (9th Cir. 2008) (*en banc*).

[24] *See* CAL. GOV'T CODE § 50030; *Riverside*, 8 Cal. Rptr. 3d at 107–08.

2. Allegedly Unreasonable Delays Conflate Regulatory Decisions with Proprietary Decisions

Just as applicants for a macro cell site (or any other project that requires a permit) generally need to prove an ownership interest or other authorization to file an application, local governments generally resolve whether they will allow a wireless facility on their own poles (or the like) in the public rights-of-way as an independent matter, and before the regulatory review (land use and/or encroachment permitting) process can meaningfully begin. The Petition appears to incorrectly assume that State and local governments make their proprietary decisions (to allow access on their own poles) simultaneously and concurrently with their regulatory decisions (to issue a land use permit). If public agencies, acting in their proprietary capacity, reach agreement to allow a carrier's facilities on their support structures, that agreement does not guarantee that a carrier's proposed facilities will comply with local right-of-way or zoning rules.

A trend among local governments to enter into an agreement with carriers on a general process to streamline regulatory review for wireless facilities placed on government-owned structures in the public rights-of-way is gaining momentum. These agreements often contain "pre-approved designs" or "pre-approved configurations" that require little or no discretionary review.[25] However, the process to reach an agreement can take several months. Local governments often lack resources and/or staff time to devote to these projects, and potential licensees – especially Mobilitie – often display an initial interest, only to disappear for several months (or longer).

To the extent that industry commenters assert there are delays in deployment, the Commission should evaluate whether those perceived delays involved (a) seeking approval to

[25] *See, e.g.*, CINCINNATI, OH., CODE, tit. VII, ch. 719 (permitting over-the-counter approvals for small cells that meet design guidelines developed in collaboration with the wireless industry).

mount antenna on, for example, a government-owned street light (*i.e.*, a proprietary decision); or (b) seeking a permit to construct a wireless facility after the owner consented to the attachment (*i.e.*, a regulatory decision). As the Commission properly recognized in the *2014 Infrastructure Order*, the presumptively reasonable times to act under § 332(c)(7) do not affect proprietary decisions.[26] Accordingly, the Bureau should find that further "clarifications" to its shot clock rules would not accelerate the deliberative or negotiation processes.

B. Applicants Themselves Often Cause Significant Delays, and Shorter Timeframes Would Likely Encourage Applicants to "Game" the Shot Clock

The Bureau's Public Notice erroneously presumes that the "'presumptive timeframes' established in the *2009 Declaratory Ruling* and the *2014 Infrastructure Order* may be longer than necessary and reasonable to review a small cell" application.[27] In fact, delays in the deployment process often arise from applicant misconduct or flaws in the Commission's rules that encourage such misconduct.

In fact, the same article cited in the Public Notice as authority for the proposition that "it frequently takes two years or more from small cell site acquisition to completion"[28] continues, in the very next sentence, to lay significant responsibility on applicants for the delays:

> "Many markets face incremental challenges driven by the backlash from the aggressive tactics of Mobilitie," Walter Piecyk of BTIG wrote in a research note in July. "We previously noted how the planning commission in San Francisco voted in favor of a code amendment to deal with the proliferation of small cells better and insure their ability to force operators to clean-up shoddy work by

---

[26] *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865, 12964 ¶ 239 (Oct. 17, 2014) ("Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances.") [hereinafter, "*2014 Infrastructure Order*"].

[27] *See* Public Notice at 11.

[28] *See id.* at 7 (quoting Colin Gibbs, *Small Cells: Still Plenty of Potential Despite Big Challenges*, FIERCEWIRELESS (Sept. 1, 2016), *available at*: http://www.fiercewireless.com/wireless/small-cells-still-plenty-potential-despite-big-challenges).

> requiring permit renewals after 10 years. We suspect that trend to continue in other towns and cities throughout America."
>
> . . .
>
> "And to be clear, Mobilitie shouldn't shoulder all of the blame," Piecyk continued. "As we continue to peel the onion, we are finding examples where Crown Castle's siting practices are aggravating local communities as well . . . ."[29]

Although more guarded, carriers share the sentiment that "some companies are being 'a little too cavalier in some instances and messing up [the industry's] ability to deploy small cells.'"[30] Those approaches cause significant delays that the Commission cannot mitigate by regulating State and local governments.

For example, despite claims from Mobilitie nearly a year ago that it would increase transparency, which included ground-breaking steps such as "us[ing] its *own name* as it works with cities and counties to develop small cell sites,"[31] the firm continues to approach municipalities under misleading pseudonyms both officious (*e.g.*, "California Utility Pole Authority") and ambiguous (*e.g.*, "Interstate Transport and Broadband, LLC," "Broadband Network of New Mexico, LLC," "OR Fiber Network Company, LLC" and "CA Transmission Network, LLC").[32]

Small cell carriers may misrepresent their legal authority, misrepresent their proposed project, disregard local processes and even construct illegal facilities without permits, including

---

[29] Gibbs, *supra* note 29.

[30] *See* Martha DeGrasse, *Carrier Small Cells Appear Slowly but Surely*, RCRWIRELESS (May 24, 2016), *available at*: http://www.rcrwireless.com/20160524/carriers/carrier-small-cells-tag4 (quoting Dave Mayo, SVP, T-Mobile, referring to Mobilitie).

[31] *See* Marth DeGrasse, *Mobilitie to Increase Transparency for Jurisdictions*, RCRWIRELESS (May 27, 2016), *available at*: http://www.rcrwireless.com/20160527/network-infrastructure/mobilitie-utility-tag4 (quoting Christos Karmis, President, Mobilitie, LLC) (emphasis added).

[32] *See, e.g.*, Email from Alexander Paul, Interstate Transport and Broadband, LLC for California Transmission Network, LLC, to Rick Angrisani, City of Clayton, Cal. (Mar. 21, 2016, 7:23 AM); Email from Keith Witcosky, City of Redmond, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 30, 2017, 4:24 PM).

the following (anecdotal) examples since the *2009 Declaratory Ruling* and the *2014 Infrastructure Order*:

Misrepresenting Legal Authority and/or Proposed Facilities. The Commission's rules prohibit applicants from making false or misleading statements to the Commission.[33] "[I]t is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency."[34] Yet, the Commission's rules neither punish nor prohibit false or misleading statements made to local governments.

Although local laws often prohibit such falsehoods and authorize a denial as a consequence, federal bans on effective prohibitions under both § 253 and § 332(c)(7) may allow an applicant who knowingly lied to a State or local government to obtain an order from a federal court to order the permits to be issued. Without real consequences for misrepresentations in permit applications, the review process is often delayed as local governments sift through applications to separate facts from falsehoods.

The following examples illustrate common misrepresentations about the applicant's legal authority and/or proposed facilities:

- Mobilitie notoriously operated under various alter egos with governmental-sounding names. Figure 1 contains annotated project plans presented to the City of Thousand Oaks, California, and depicts the type of alter ego name that Mobilitie has used for plans presented to many cities in various other states.

[*space intentionally left blank*]

[33] *See* 47 C.F.R. § 1.17.

[34] *Schoenbohm v. FCC*, 204 F.3d 243, 247 (D.C. Cir. 2000) (citing *Swan Creek Commc'ns, Inc. v. FCC*, 39 F.3d 1217, 1221–1224 (D.C. Cir. 1994) and *Garden State Broad. Ltd. v. FCC*, 996 F.2d 386, 393–94 (D.C. Cir. 1993)).

EXHIBIT H

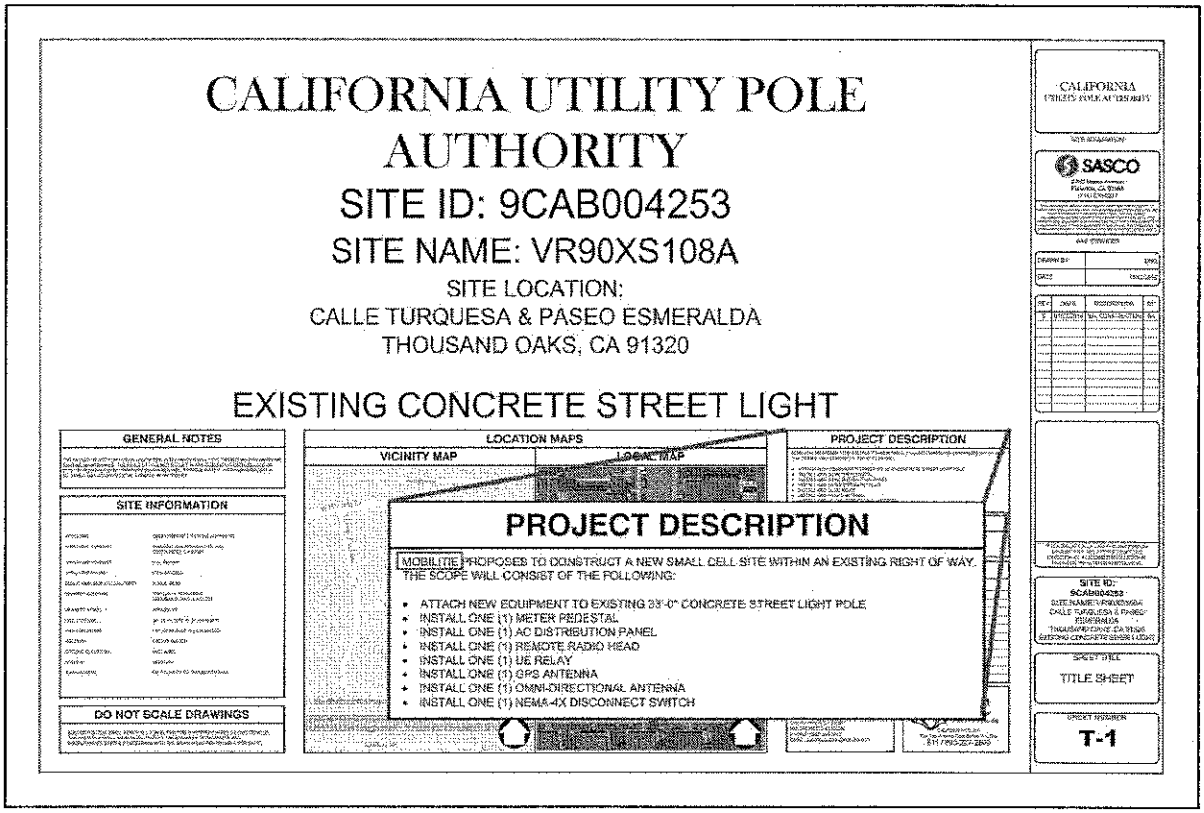


Figure 1

One plausible reason why a deregulated, private corporation that installs and operates wireless equipment on utility poles would assume a name like the "California Utility Pole Authority" is that may have hoped to convince some actual governmental authorities to grant special benefits or exemptions, or to perceive that only state-level oversight is required, precluding local jurisdiction approvals.

- Numerous entities, which include Mobilitie, Crown Castle, ExteNet and Verizon Wireless, misrepresent that their status as either a "telephone corporation" or "CLEC" under state law entitles them to the same regulatory treatment as electric, water and natural gas corporations.[35]

[35] *See, e.g.*, Letter from Michael van Eckhardt, AT&T, to John Conley *et al.*, City of Vista, Cal., at 3 (Feb. 8, 2017) (objecting to any concealment requirements for new small cells in the public rights-of-way); Letter from Paul Albritton, Counsel for Verizon Wireless, to John Conley *et al.*, City of Vista, Cal., at 3 (Feb. 8, 2017) (contending that state law prohibits any inquiry into the technical reasons why an applicant desires a new small cell in a particular location); Letter from Michael Shonafelt, Counsel for Crown Castle, to Mayor Clyde Roberson *et al.*, City of Monterey, Cal., at 4 (Oct. 17, 2016) ("Crown Castle's special regulatory status as a CLEC gives rise to a vested right under Public Utilities Code section 7901 to use the ROW . . . [and] . . . Crown Castle contends that a discretionary use permit – like that required by the City in this case – constitutes an unlawful precondition for a CLEC's entry into the ROW") (citing *See T-Mobile W. LLC v. City and Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248 (Ct. App. 2016) (review granted by California Supreme Court on 12/21/16, S238001); Letter from Paul Albritton, Counsel for Verizon Wireless, to Chair Daniel Fletcher *et al.*, City of Monterey, Cal., at 1-2 (Sept. 13, 2006) ("[R]ight-of-way wireless facilities should be permitted through an encroachment permit, not a use permit,

- In August 2016, the Minnesota Department of Commerce sent a letter to Mobilitie demanding that "Mobilitie cease from asserting that PUC authority has exempted it from the regulatory requirements of local government units."[36] News stories about similar misrepresentations to cities and counties seem to follow Mobilitie in several other states, as well.[37]

- In Clayton, California, Mobilitie initially contacted city staff to request information on permitting procedures and a potential right-of-way use agreement.[38] After city staff provided Mobilitie with guidelines and instructions for each process, Mobilitie ended contact with city staff.[39] Several months later, a representative from CA Transmission Network, LLC (one of Mobilitie's corporate alter egos) contacted the city engineer and falsely asserted that CA Transmission Network, LLC was a California Public Utilities Commission-regulated public utility.[40] To date, the California Public Utilities Commission still has not granted CA Transmission Network, LLC's application for a Certificate of Public Convenience and Necessity ("CPCN").[41] Mobilitie's representative further indicated that it would submit construction permit applications for two 120-foot transport poles rather than follow the procedures initially outlined by city staff. When questioned about the proposed locations, staff discovered that the permits that Mobilitie requested from Clayton to deploy a 120-foot transport pole were for a location in an adjacent jurisdiction.[42]

- Mobilitie's representatives falsely claimed to city staff in Pleasanton, California, that it received approvals from the City of Thousand Oaks, California, to install unconcealed facilities on streetlights in a residential neighborhood. Mobilitie also provided project

---

because Verizon Wireless, as a telephone corporation, is authorized to use the right-of-way under California Public Utilities Code § 7901."); Letter from David Bronston, counsel for Mobilitie, LLC, to Andrew J. Benelli, City of Fresno, Cal., at 1 (Apr. 8, 2016) ("Applicant has been granted a Certificate of Public Convenience and Necessity by the California Public Utilities Commission and is a utility under the laws of the state. As a public utility, Applicant is entitled to access to the public rights of way.").

[36] Letter from Diane Dietz, Minn. Dept. of Commerce, to Chester Bragado, Mobilitie, LLC (Aug. 4, 2016).

[37] *See, e.g.*, Alyssa Stahr, *Minnesota Utilities Warn Mobilitie About Misrepresentation*, INSIDETOWERS, *available at*: https://insidetowers.com/cell-tower-news-minnesota-utilities-warn-mobilitie-misrepresentation/ (last visited Feb. 27, 2017) (describing controversies in Virginia); *Officials Feel Mobilitie is Disingenuous as Moratoriums Mount Throughout the Nation*, WIRELESSESTIMATOR (Nov. 26, 2016), *available at*: http://wirelessestimator.com/articles/2016/officials-feel-mobilitie-is-disingenuous-as-moratoriums-mount-throughout-the-nation/ (describing controversies in Florida, California and Connecticut); J. Sharpe Smith, *Municipalities, Mobilitie have a Meeting of the Minds*, AGL (Oct. 11, 2016), *available at:* http://www.aglmediagroup.com/municipalities-mobilitie-have-a-meeting-of-the-minds/ (describing controversies in Connecticut).

[38] *See, e.g.*, Email from Savir Punia, Mobilitie, LLC, to Mindy Gentry, City of Clayton, Cal. (Aug. 31, 2015, 9:48 AM); Email from Mindy Gentry, City of Clayton, Cal., to Savir Punia, Mobilitie, LLC (Sept. 17, 2015, 9:55 AM).

[39] *See* Email from Richard Tang, Mobilitie, LLC, to Mindy Gentry, City of Clayton, Cal. (Oct. 27, 2016, 5:00 PM).

[40] *See* Email from Alexander Paul, Interstate Transport and Broadband, LLC for CA Transmission Network, to Rick Angrisani, City of Clayton, Cal. (Mar. 21, 2016, 7:23 AM).

[41] *See In the Matter of the Application of CA Transmission Network, LLC*, Docket No. A1608012 (Aug. 19, 2016).

[42] *See* Email from Rick Angrisani, City of Clayton, Cal., to Alexander Paul, Interstate Transport and Broadband, LLC for CA Transmission Network, LLC (Mar. 21, 2016, 7:30 AM).

plans to Pleasanton city staff for the alleged Thousand Oaks facilities as evidence. When Pleasanton contacted Thousand Oaks, they discovered that Mobilitie had not yet even contacted Thousand Oaks, much less applied for city permits for those facilities. A similar scenario occurred in San Dimas, California, when Mobilitie falsely claimed that other nearby jurisdictions had approved 120-foot poles in the public rights-of-way.

- In La Crosse, Wisconsin, Mobilitie's representatives presented information about Mobilitie's facilities that falsely represented their physical size and scale.[43] The presentation included the slide shown in Figure 2, below.

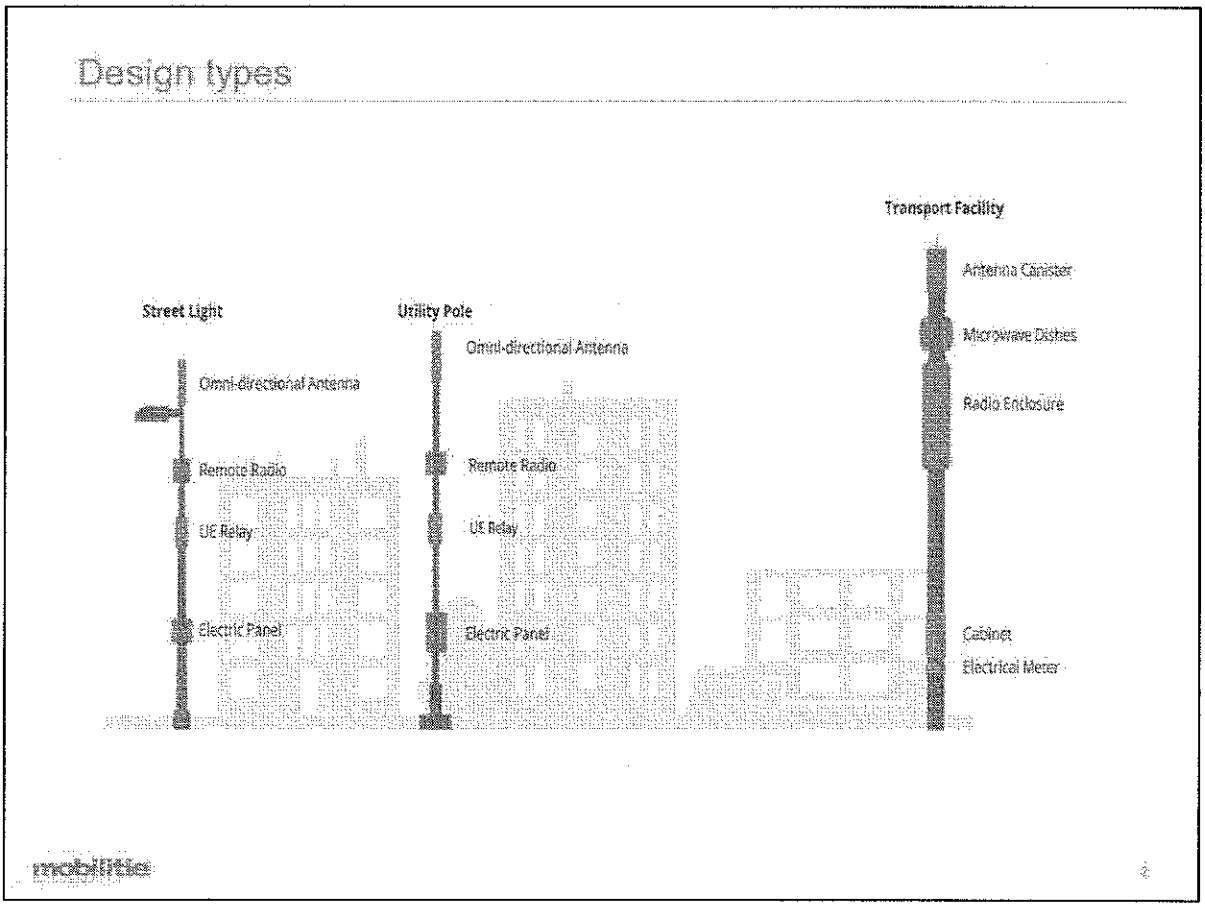


Figure 2: Power Point Slide Presented by Mobilitie to La Crosse, Wisconsin, Public Works Board on Jan. 23, 2017.

Figure 2 suggests that all Mobilitie's facilities are approximately the same size. However, as illustrated in the scaled graphic in Figure 3, below, the graphic grossly understates the actual differences between Mobilitie's facilities.

[43] *See* "Mobilitie Presentation" at 10 (Jan. 23, 2017), *available at*: http://cityoflacrosse.legistar.com/LegislationDetail.aspx?ID=2930404&GUID=D4B0E9C5-A313-48D1-97B4-EABD788E7E5B&Options=&Search=.

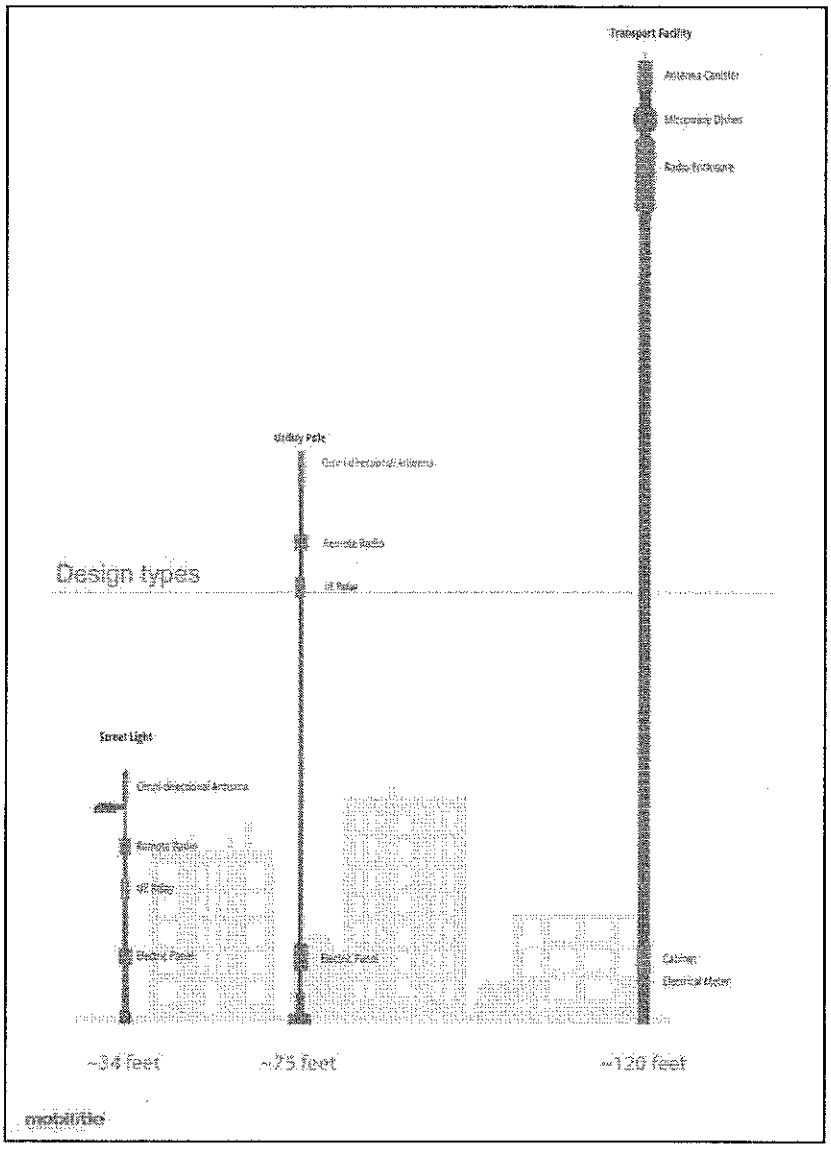


Figure 3: Mobilitie Slide Modified to Show Actual Scale Relative to the Street Light Installation.

Even wireless industry members find this misrepresentation "absurd" because the 120-foot transmission towers "dwarf [the] other options . . . ."[44] Misrepresentations of this magnitude justifiably cause local governments to scrutinize Mobilitie's applications.

Disregarding Local Process and Gaming the Shot Clock. A pattern has emerged since the Commission adopted the *2014 Infrastructure Order* in which applicants flaunt local

[44] *See Mobilitie's DAS Marketing Illustrations are Labeled as "Quite Deceptive"*, WIRELESSESTIMATOR (Feb. 17, 2017), *available at*: http://wirelessestimator.com/articles/2017/mobilities-das-marketing-illustrations-are-labeled-as-quite-deceptive/.

processes and submit woefully inadequate "applications" for multiple sites, often to an incorrect department within the municipality. Ambiguous letters from applicants with multiple preliminary site plans often arrive on Friday afternoons or before a long holiday weekend. These applicant behaviors appear to be geared toward gaming the shot clock—submitting just enough to start the clock and then lying in wait for time to expire as the local officials attempt to make heads or tails from a cover letter with multiple site plans that arrived in the mail.

- The California Street Light Association ("CALSLA") compiled comments from its constituent California cities and counties documenting, among other things, that Mobilitie has (1) failed to provide accurate project descriptions or equipment specifications upon request by local officials, (2) submitted incomplete applications, (3) terminated communications with local officials after submitting incomplete applications, (4) erroneously claimed exemptions from permitting procedures, local regulations and state environmental compliance laws and (5) complained of high fees without explaining why the fees would be unreasonable.[45] Their full responses appear in **Exhibit A** to these comments.

- In Albuquerque, New Mexico, Mobilitie approached that city with proposals for small cells on poles without identifying the owner of the poles.[46] After Mobilitie confirmed that it desired to attach to certain city-owned poles, Mobilitie failed to respond to the city's requests that Mobilitie enter into lease negotiations to obtain the required property rights for attachments to city-owned poles.[47]

- Mobilitie's representative hand-delivered to the City of Pleasanton, California, a letter styled as an introduction with 12 plan sets for new facilities attached.[48] Rather than follow the city's publicly-stated application process, Mobilitie treated the letter as a single application filed for all 12 sites. The letter was dated and delivered on a Friday. Under California state law, any application for a wireless installation may be deemed-approved if the local government fails to act within the Commission's presumptively reasonable timeframe for review.[49] The apparent intent behind the letter was to submit an "application" that would trigger the shot clock but not be seriously reviewed by the local government staff, which would likely result in a deemed-approval. The same scenario played out in several other Northern California cities, including Antioch, Brentwood, Concord,

[45] *See* Letter from Jean A. Bonander, CALSLA, to Michael Johnston, Telecom Law Firm PC (Feb. 15, 2017).
[46] *See* Email from Kathleen T. Ahghar, City of Albuquerque, N.M., to Kevin Winner, ITB Utility (May 17, 2016, 1:35 PM).
[47] *See* Email from Jane L. Yee, City of Albuquerque, N.M., to Brenna Moorhead, Goodwin Procter LLP, counsel for Broadband Network of New Mexico, LLC (Jan. 18, 2017, 2:05 PM).
[48] *See* Letter from Richard Tang, Mobilitie, LLC, to Jenny Soo, City of Pleasanton, Cal. (Oct. 14, 2016).
[49] *See* CAL. GOV'T CODE § 65964.1.

Richmond, San Pablo, and Pittsburg. Mobilitie's representative also delivered a letter to the City of Fresno, California, which at that time did not require a special permit for installations on unpaved road shoulders, on a Friday.[50]

- In Richmond, California, Mobilitie's representative submitted encroachment applications for 13 new wireless facilities even though the Richmond Municipal Code expressly required a prior authorization from the Community Development Department.[51] A month later, Mobilitie emailed the city project plans for three additional sites but did not submit any additional applications or fees. Two sites were proposed to be located on city-owned streetlights without prior authorization from the city. City staff also discovered that one site was proposed to be located on private property. Although city staff suggested some potential alternative locations on private electric company poles, Mobilitie ultimately withdrew its applications.

- In Brentwood, California, Mobilitie's representative submitted a letter to the city's Public Works Department with project plans, an insurance certificate and a check for $144, but not an application for a use permit as expressly required by the Brentwood Municipal Code.[52] Again, Mobilitie tendered the "application" on a Friday. Although the letter described the project plans as "construction drawings," the attached plans stated on each page: "PRELIMINARY NOT FOR CONSTRUCTION."[53]

- In Goleta, California, Mobilitie's representative emailed that city project plans for six new wireless facilities, but with no application or fees. The email acknowledged that the city requires a "Right-of-Way Access Agreement" (*i.e.*, a standard document required for all entities that carry on operations in the public rights-of-way that sets out maintenance, insurance, safety and other operational requirements, but does not require any fees), but Mobilitie claimed that "our CPCN which can serve in lieu of a City-specific ROW Access/Franchise Agreement."[54] The email also requested that the city confirm who owns the poles to which Mobilitie wanted to attach their equipment.[55] This email made clear that Mobilitie did not positively know who owned the pole before it submitted applications for attachments.

- In Richmond, California, ExteNet submitted 31 encroachment permit applications for small cells without first obtaining a use permit from the city, which was required by the

[50] *See* Letter from Rebecca Eichinger, Mobilitie, LLC, to Andrew Benelli, City of Fresno, Cal. (Jun. 3, 2016).
[51] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Richmond, Cal. (Aug. 29, 2016). This letter was dated on a Monday, but Mobilitie's representative hand delivered the applications on a Wednesday (the city closes on Fridays due to State budget shortfalls).
[52] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Brentwood, Cal., Public Works Department (Aug. 2, 2016). The letter was received on August 19, 2016, as evidenced by the city's in-take stamp.
[53] *See id.*
[54] *See* Email from Ben Johnson, Mobilitie, LLC, to Marti Milan, City of Goleta, Cal. (Jan. 31, 2017, 4:13 PM).
[55] *See id.*

City's recently adopted ordinance that was effective and published before ExteNet submitted its applications.[56] These applications were received by the city on a Thursday.

- ExteNet submitted 10 applications to Concord, California, for facilities throughout both residential and commercial neighborhoods that it alleged should all be subject to administrative approval, despite local regulations that required public notice with a possible public hearing for highly visible wireless facilities placed in close proximity to residential uses.[57]

- In Gresham, Oregon, Mobilitie submitted a single application for six of its sites without addressing the criteria clearly set out in the local code. Subsequently, a Mobilitie representative acknowledged that the applications were submitted without reviewing the applicable code provisions.[58]

- In Monterey, California, on the day before an appeal to the city council from a permit denial, legal counsel for Crown Castle sent a letter to legal counsel for the city that stated:

> . . . in the event the City Council departs from the recommendations of the Staff Report [to grant the appeal and approve the permit] and adopts new conditions or otherwise raises concerns that have the potential for a denial of the Appeal, ***Crown Castle hereby requests a continuance of the hearing***. Crown Castle makes this request on the record now . . . . Please include this letter in the administrative record of the Appeal. Crown Castle's representatives will be on hand at tonight's meeting to answer any questions.[59]

That night, the Monterey city council heard evidence that the proposed site would potentially obstruct view of the historic Cannery Row and decided to schedule a special meeting at the project site to assess first hand whether and to what extent the proposed location might impact historic assets.[60] A different attorney for Crown Castle stood up and objected to the continuance. When the mayor asked whether the attorney knew that its client already requested a continuance for exactly this purpose, the attorney said he did, but that he withdrew consent to the continuance because he claimed that shot clock had expired and wished to pursue a deemed-approved remedy under state law.

---

[56] *See* Letter from Yader Bermudez, City of Richmond, Cal., to Matt Yergovich, ExteNet Sys. (Cal.) LLC (Nov. 15, 2016).

[57] In this case, ExteNet's representative submitted both the initial applications and his responses to the city's incomplete notices on Mondays. Although the applications were misfiled and incomplete, it does not appear that their representative attempted to intentionally game the shot clock in the same manner as those who routinely submit on Fridays.

[58] *See* Email from David R. Ris, City of Gresham, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 23, 2017, 3:56 PM).

[59] Letter from Michael Shonafelt, counsel for Crown Castle, to Robert May, counsel for City of Monterey, Cal., at 2 (Oct. 4, 2016) (emphasis in original).

[60] *See* Monterey City Council, Meeting Minutes at 5 (Oct. 4, 2016), *available at*: http://isearchmonterey.org/cache/2/yvx5igkacsotydo441kqyukq/366444022820170918125 44.PDF.

- In early April 2016, Mobilitie submitted four encroachment permit applications to the City of Antioch, California, for installations on city-owned streetlights without any prior authorization from the city to use its streetlights. The applications listed the owner as "N/A."

- In Sacramento, California, Mobilitie requested to meet with Public Works staff and brought 40 incomplete applications, which included applications for fifteen 120-foot steel poles. When staff informed Mobilitie that it could not accept 40 incomplete applications, Mobilitie's representative left the packet on the security desk in the lobby in an apparent attempt to be able to later claim that the shot clock had been started.[61]

- In Yuma, Arizona, after receiving a letter from the city that outlined how Mobilitie's initial application failed to satisfy the city's code for obtaining a city telecommunications license, Mobilitie resubmitted its application with general responses that appeared intended to avert answering the city's questions. After a second letter from the city, Mobilitie's third submission continued to provide vague and inadequate responses to the city's questions on items as basic as what infrastructure Mobilitie intended to install in the city's right-of-way. When the city sent a third letter to Mobilitie explaining the deficiencies, Mobilitie never responded.

Unpermitted Installations. Until recently, local officials would only occasionally discover unpermitted modifications to existing wireless facilities. Totally unpermitted sites were rare. However, as one author predicted, "[t]he scary proposition may be that, in the interest of time-to-market, [Mobilitie] does not ask for permission, but simply puts up the new poles and then deals with the backlash later."[62] This prediction proved to be correct:

- In March 2016, in Baltimore, Maryland, Mobilitie installed a new, "a roughly three-story-tall utility pole" without permits that obstructed access to an ADA sidewalk ramp.[63] The city commenced a code enforcement action and fined Mobilitie for the violation.[64]

---

[61] *See* Email from Darin Arcolino, City of Sacramento, to Omar Masry, City of San Francisco (July 7, 2016, 12:35 PM).

[62] *See* Iain Gillott, *Analyst Angle: Sprint Network Plan Equals 'Network Suicide'*, RCRWIRELESS (Jan. 25, 2016), *available at*: http://www.rcrwireless.com/20160125/opinion/analyst-angle-sprints-network-plan-equals-suicide-2-tag9.

[63] *See* Ryan Knutson, *Sprint's Wireless Fix? More Telephone Poles: Wireless Provider's Innovative Plan to Boost Cell Service Runs into Local Hurdles*, WALL ST. J. (Jun. 7, 2016, 6:03 PM), *available at*: https://www.wsj.com/articles/sprints-drive-to-improve-coverage-faces-permit-delays-1465337015.

[64] *See One Company Fined for Not Getting a Small Cell Permit, Another for not Permitting Inspectors*, WIRELESSESTIMATOR (Apr. 4, 2016), *available at*: http://wirelessestimator.com/articles/2016/one-company-fined-for-not-getting-a-small-cell-permit-another-for-not-permitting-inspectors/.

- In Denison, Texas, Mobilitie construed a nearly 90-foot tower in the public rights-of-way without prior approval from the city. Mobilitie sent the city a self-styled application letter (similar to what it provides other cities) with project plans marked "PRELIMINARY NOT FOR CONSTRUCTION," rather than the application form required by the city. The city never issued any permits.

- In Vallejo, California, staff discovered an unpermitted Verizon small cell on a utility pole after Verizon submitted an application for a building permit. When city staff notified Verizon of the unpermitted work, Verizon threatened legal action if the city did not issue a permit within a week.[65]

Wireless carrier tactics like these disrupt and delay the deployment process, and prevent cooperative and collaborative partnerships.[66] As one industry member and observer put it:

> So what makes [Mobilitie's conduct] so different than what other players do? Not really that much. But the tipping point here is if a municipality feels that a wireless company has misrepresented itself or what it is doing, the relationship between the whole wireless industry and the municipality is soured. If you are the company coming in after a wireless company has upset a municipality, don't expect a warm reception. We all have a responsibility to treat municipalities with respect and honesty.[67]

C. If the Commission Addresses its Rules, it Should Seek to Eliminate Uncertainties and Counterproductive Incentives

To the extent that the Bureau seeks comment on further "clarifications" to the *2009 Declaratory Ruling* and the *2014 Infrastructure Order*, Local Governments offers the following specific recommendations.

1. The Commission Should Define "Duly Filed" as the Time at Which the Applicant Tenders a *Complete* Application

Counterproductive carrier conduct often occurs in the submittal phase because, under the "clarifications" in the *2014 Infrastructure Order*, "the presumptively reasonable timeframe begins to run when an application is first submitted" – no matter how incomplete the first

[65] *See* Email from Teri Killgore, City of Vallejo, Cal., to Michael Johnston, Telecom Law Firm PC (Feb. 7, 2017, 10:40 AM).
[66] *See, e.g.*, Worthman, *supra* note 4.
[67] *Id.*

submittal may be.[68] Despite the Commission's rule that requires local governments to publish their application requirements in advance, woefully incomplete application submittals have become the rule rather than the exception.[69] Given that the Commission's other rules already bar *ex post facto* application requirements, carriers should be expected (and required by the Commission) to tender complete submittals and there should be no excuse for an incomplete application – and certainly no incentive.[70]

At the very least, the Commission should declare that the shot clock does not begin to run when the "submittal" does not even appear on the proper form provided by the jurisdiction. Mobilitie's conduct appears to seek to start the shot clock no matter how incomplete the application, and its representatives often submit a mere letter that states Mobilitie expects to commence construction in the near future.[71]

The Commission has consistently recognized local governments' right to require an application.[72] Allowing applicants to trigger the shot clock with an incomplete application, or in some cases no application at all, encourages attempts to deceive local governments and game the shot clock. Accordingly, the Commission should revise its clarification in the *2014 Infrastructure Order* and declare that the presumptively reasonable time for review begins to run when the applicant tenders a *complete* application.

---

[68] *2014 Infrastructure Order* at ¶ 258.
[69] *See id.* at ¶ 260 ("[I]n order to toll the timeframe for review on grounds of incompleteness, a municipality's request for additional information must specify the code provision, ordinance, application instruction, or otherwise publically-stated [sic] procedures that require the information to be submitted.").
[70] *See id.* at ¶¶ 217, 260.
[71] *See generally* Part II.A, *supra.*
[72] *See 2014 Infrastructure Order* at ¶ 211 (Oct. 24, 2014); *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling*, WT Docket No. 08-165, 24 FCC Rcd. 13994, 13994 (Nov. 18, 2009) (assuming local authority to require an application) [hereinafter "*2009 Declaratory Ruling*"].

2. The Commission Should Dispense with the "10-Day Resubmittal" Review Period and the Limitations on Subsequent Incomplete Notices Within the First 30 Days

The 10-day resubmittal review period further encourages applicants to tender resubmittals right before weekends, holidays and other government closures.[73] And the so-called "one-shot" rule that limits subsequent incomplete notices to items specifically delineated in the first incomplete notice,[74] encourages applicants to withhold legitimate requests for additional information based on a minor procedural oversight in the first incomplete notice. The Commission should eliminate these rules.

These complex procedural rules do not coincide with the practical realities involved in wireless facility siting reviews. Although the Commission's rules might seem more reasonable if one person were responsible to review an application, local governments almost always route applications through multiple departments with specialized knowledge over engineering, right-of-way management, land use planning, finance and other disciplines. If one department sends an incomplete notice to the applicant with respect to their narrow review, the applicant can claim that the notice precludes other incomplete notices from the other departments because their concerns would not relate back to the incompleteness cited in the first notice.

The Commission should eliminate the 10-day resubmittal review period and the limitations on subsequent incomplete notices within the first 30 days.

---

[73] In this respect, the 10-day resubmittal review period appears to conflict with at least two Commission rules: (a) The holiday-exception procedural rule for replies due within 10 days or less. *See* 47 C.F.R. § 1.4(h) (providing that where "the filing period for a response is 10 days or less, an additional 3 days (excluding holidays) will be allowed to all parties in the proceeding for filing a response"); and (b) The 15-day review period for "[a]ny amendments to an application for renewal of any instrument of authorization . . . ." *See id.* § 73.3578; *see also* § 1.927(h) (providing that amendments to application that "constitute[] a major change shall be treated as a new application" altogether).

[74] *See 2014 Infrastructure Order* at ¶ 218.

III. THE COMMISSION CANNOT PERMISSIBLY INTERPRET THE PROVISIONS IN § 253 AS PROPOSED IN MOBILITIE'S PETITION

Mobilitie asks the Commission to interpret the safe harbor for "fair and reasonable compensation" for access to the public rights-of-way in § 253(c) as strict cost recoupment, in direct contradiction with Congress' statutory scheme in the Communications Act and express intent in the Congressional record. The Commission should dismiss Mobilitie's Petition and decline to interpret § 253(c).

A. "Fair and Reasonable Compensation" Refers to Regulatory Fees, and § 253 Does Not Authorize the Commission to Preempt Compensation Paid to States or Local Governments as Market Participants

"Fair and reasonable compensation" refers to fees charged by State and local governments in their regulatory – not proprietary – capacities as consideration for access to the public rights-of-way.[75] Federal preemption prohibits State and local governments "from *regulating* within a protected zone" but does not prohibit proprietary activities within such preempted fields.[76] As the Supreme Court stated:

> [a] State does not regulate . . . simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption . . . because pre-emption doctrines apply only to state *regulation*.[77]

The same principle applies to preemption under the Communications Act.[78] Whatever the Commission's authority may be to interpret the term "fair and reasonable consideration" with respect to regulatory fees, the Commission simply lacks the authority to preempt State or local governments in their proprietary capacity as a market participant. Accordingly, the Commission

---

[75] *See Portland*, 385 F.3d at 1240.

[76] *See Bldg. and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 226–27 (1993) (emphasis added).

[77] *Id.* (emphasis in original).

[78] *See, e.g., Portland*, 385 F.3d at 1240 (recognizing that Section 253(a) preempts only "regulatory schemes"); *Mills*, 283 F.3d at 421 (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

should reject Mobilitie's plea to have the Commission regulate State or local governments, where states and local governments enter into arm's-length agreements as market participants with the wireless industry.

B. "Fair and Reasonable Compensation" Does Not Mean Compensation Based on Cost Recoupment Alone

Mobilitie's proposal to limit compensation for commercial telecommunications uses the public rights-of-way conflicts with existing statutes on rate regulation and Congressional intent to preserve local authority to charge rates based on gross revenues. The Commission should reject Mobilitie's proposal.

1. "Fair and Reasonable" Compensation Means Something More than "Just and Reasonable" Compensation

A crucial flaw in Mobilitie's proposal to interpret "fair and reasonable" as cost recoupment is that Congress uses the phrase "just and reasonable" in the Communications Act when it intends to describe a cost-based compensation scheme.[79] "[F]air and reasonable" under § 253(c) cannot mean the same as "just and reasonable" under § 224 or § 251 because different words in the same act have different meanings.[80] Thus, contrary to Mobilitie's claim that the dictionary definition for "compensation" compels the Commission to define this term as "cost,"[81] the plain language in Congress' statutory scheme clearly shows that "fair and reasonable" means something *other than* cost.

Moreover, "fair and reasonable compensation" must mean something *greater than* cost given that Congress did not intend the "fair and reasonable" standard to subsidize for-profit

---

[79] *See, e.g.*, 47 U.S.C. § 224(d)(1) (establishing a cost-based formula for pole attachment rates); 47 U.S.C. § 251(d)(1)(A)(i) (defining "just and reasonable" rates for interconnection as "based on the cost").
[80] *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").
[81] *See* Petition at 24.

telecommunications providers at the States' or local governments' expense.[82] Despite Mobilitie's argument that Congress chose the word "compensation" over "payments,"[83] at least one federal court has held that:

> Congress chose the term compensation, rather than cost, to further its intent that local municipalities be permitted to recoup revenue in exchange for a telecommunications provider's use of the public streets.[84]

Especially where municipalities act in their proprietary (not regulatory) capacity to lease or license space on their own traffic signals, light poles or the like, their "fair and reasonable" compensation is defined by market value. The Commission should reject Mobilitie's proposal to limit "fair and reasonable compensation" to mere a cost-based fee. To hold otherwise could amount to a regulatory taking, in violation of the Fifth Amendment.[85]

2. State and Local Governments May Impose Fees Based on Gross Revenues

In 1996, Congress considered and overwhelmingly rejected (by a 4-to-1 margin) an alternative to the "fair and reasonable compensation" approach that would have required State and local governments to charge all telecommunications service providers the same fees.[86] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[87] One district court has found that neither § 253(c) (as passed by Congress), Congressional history, nor case law limits a city from charging more than their "cost of

---

[82] *See* 141 CONG. REC. H 8460 (Aug. 4, 1995) (statement of Rep. Stupak).
[83] *See* Petition at 24.
[84] *See Elec. Lightwave*, 452 F. Supp. 2d at 1072.
[85] *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (noting that "it is most reasonable to construe the reference to 'private property' in the Takings Clause . . . as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.'").
[86] *See* 141 CONG. REC. H 8427 (Aug. 4, 1995).
[87] *I.N.S. v. Cardoza–Fonseca*, 480 U.S. 421, 442–43 (1987).

maintaining the rights of way. Nor does it require absolute parity among providers and utilities in setting compensation levels. Rather, those restrictions are an overlay put forth by telecommunications providers . . . and it is not the law in any circuit."[88]

When Congress was considering 1996 Telecommunications Act, a proposal then styled as § 243(e) stated in full:

> PARITY OF FRANCHISE AND OTHER CHARGES.—Notwithstanding section 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services *that distinguishes between or among providers of telecommunications services*, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit, or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.[89]

In response to concerns that this "parity" requirement would unfairly prevent different fees for different uses that imparted different impacts on the rights-of-way and the public's use, a bipartisan amendment offered by Congressmen Barton and Stupak proposed to completely delete Section 243 and replace it with language substantially similar to the current law.[90] Congressman Stupak stressed that, under the proposed § 243(e), "local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets."[91] Given that many incumbents paid little or no actual compensation under sometimes-ancient franchises, the parity requirement would effectively subsidize new entrants

---

[88] *Elec. Lightwave*, 452 F. Supp. 2d at 1074–1075.
[89] 141 CONG. REC. H 8427 (Aug. 4, 1995) (emphasis added).
[90] *See* 141 CONG. REC. H 8460–8461 (Aug. 4, 1995). *See also* Fredrick E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism and the Public Right-of-Way*, 26 SEATTLE UNIV. L. REV. 475, 521–23 (2003) (discussing at length the legislative history behind the Stupak Amendment).
[91] 141 CONG. REC. H 8460 (Aug. 4, 1995) (statement of Rep. Stupak).

who would be permitted to use public property at the public's expense.[92] Congressman Barton stated that "[t]he Federal Government has absolutely no business telling State and local governments how to price access to their local right-of-way."[93]

The House overwhelmingly adopted the Stupak-Barton amendment and rejected the parity requirement.[94] The amendment confirms that the House (a) intended local governments to determine compensation for access to the rights-of-way and that charges might differ among various users; and (b) rejected in 1996 a proposal similar to Mobilitie's petition in 2017.

Mobilitie's proposed cost-based "compensation" scheme with exemptions from gross-revenue fees seeks to resurrect the "parity" requirement Congress discarded in the Stupak-Barton amendment. Such a construction would be struck down because "it appears from the statute or its legislative history that the [definition] is not one that Congress would have sanctioned."[95]

Although Mobilitie attempts to shoehorn statements by Senator Diane Feinstein that describe rights-of-way management functions into limitations on compensation,[96] Senator Feinstein's statements concerned the Commission's preemptive scope under § 253(d) rather than the permissible "compensation" protected under § 253(c).[97] Senator Feinstein's proposed amendment to limit the Commission's preemptive powers cannot be understood as tacitly endorsing limitations on compensation for access to the public rights-of-way.

---

[92] *See id.* at H 8460 (statement of Rep. Stupak). As an example, Congressman Stupak submitted evidence that cities collectively spent more than $100 billion on right-of-way maintenance in 1994, but collected only $3 billion in fees from all rights-of-way users, including gas, water, electric and telecommunications companies. *See id.* (statement of Rep. Stupak).

[93] *Id.* at H 8460 (statement of Rep. Barton).

[94] *See id.* at H 8477 (10 representatives did not vote).

[95] *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984).

[96] *See* Petition at 25.

[97] 141 CONG. REC. S 8305–8306 (Aug. 4, 1995).

The Congressional record clearly shows that Congress considered gross-revenue fees to be permissible. Several federal courts agree that § 253(c) does not prohibit compensation based on gross revenues.[98] The Commission should, too.

IV. THE COMMISSION SHOULD CONSIDER ALTERNATIVES TO RESOLVE THE ISSUES RAISED BY MOBILITIE, BASED ON THE COMMISSION'S OWN PAST PRACTICE

Mobilitie's Petition lacks merit and should be dismissed. However, to the extent that the Bureau desires to address any issues raised in Mobilitie's Petition or the Public Notice, the Bureau should follow the recommendations set forth in the National Broadband Plan and the example set by Chairman Pai in creating the Broadband Deployment Advisory Committee and engage with federal, state, local, tribal and industry stakeholders in a meaningful factual investigation.

Whether the Commission has the legal authority to adopt substantive, legislative-type rules through a declaratory ruling does not guarantee the rules adopted will achieve their intended purpose. For the reasons discussed below, a collaborative, fact-based and consensus-driven approach is needed to accelerate wireless broadband.

---

[98] *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 543 (D.P.R. 2003) (holding that "Section 253(c) of the Telecom Act does not explicitly forbid revenue-based fees" and approving of an "approach which does permit a municipality to obtain a reasonable 'rent' for [a carrier's] use of [the municipality's] property"); *Qwest v. City of Portland*, 200 F. Supp. 2d at 1256–1257 (concluding that Ninth Circuit precedent "does not stand for the proposition that § 253(a) categorically bars all revenue-based right-of-way fees"). Also, contrary to Mobilitie's assertion of a circuit split on "fair and reasonable compensation," *see* Petition at 26–28, the courts agree that a fee's relationship to cost can be an important – but not dispositive – factor. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006) (finding that a franchise fee need not be limited to cost but should have some relationship to it); *Santa Fe*, 380 F.3d at 1271–1272 (finding that "fair and reasonable" should be evaluated under a totality of the circumstances test, including costs); *Dearborn*, 206 F.3d at 624–25 (same); *Qwest v. City of Portland*, 200 F. Supp. 2d at 1256–1257.

A. The Commission Should Issue a Notice of Inquiry Rather than Continue to Promulgate Legislative Rules Though Adjudicatory Proceedings

Mobilitie's Petition seeks a declaratory ruling to interpret provisions in § 253(c), and the Public Notice sought comment on "whether the Commission should issue a declaratory ruling to further clarify" the *2009 Declaratory Ruling* or the *2014 Infrastructure Order*.[99] The Bureau's Public Notice appears self-convinced that the best course lies in adjudication rather than rulemaking.[100] Local Governments disagree.

Although the Commission may exercise discretion as to whether to proceed by adjudication or rulemaking, that discretion is not unlimited.[101] New rules and changes to existing ones could amount to substantive, legislative-type rules that may call for compliance with the notice-and-comment requirements in the Administrative Procedures Act. The Commission should explore the issues raised in the Public Notice through a Notice of Inquiry ("NOI"), which could be followed by a Notice of Proposed Rulemaking ("NPRM").

As a practical matter, the Commission lacks a complete and relevant record on the issues raised in the Public Notice. Although the Public Notice appears to suggest that the record from prior proceedings is sufficient, this would mean reliance on stale comments and anecdotes about problems the Commission already addressed in connection with different technologies.[102] Moreover, the Public Notice lacks sufficiently specific propositions to put the public on notice about potential new or changed rules.[103]

---

[99] *See* Public Notice at 10.
[100] *See* Public Notice at 6–7.
[101] *See SEC v. Chenery Corp.*, 332 U.S 194, 202–03 (1947); *see also Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976). The Administrative Procedure Act requires that the Commission publish its proposed rule in the Federal Register, give interested persons an opportunity to participate in the proceedings, consider relevant matters presented, state the basis and purpose for the rule and then publish any substantive rule in the Federal Register at least 30 days prior to the effective date. *See* 5 U.S.C. §§ 553(b)-(d); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).
[102] *See* Public Notice at 8–9.
[103] *See Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 168–71 (D.C. Cir. 2013).

To the extent that the Commission desires to investigate ways to improve small cell deployment practices, the Commission should engage with stakeholders to develop an NPRM based on a robust record.

B. The Commission Should Follow its Staff's Prior Recommendation and Form a "Joint Task Force" to Consider Best Practices for Deployments in the Public Rights-of-Way

State and local government should play a key role in the development of proposed improvements to the small cell deployment process. In the National Broadband Plan issued in 2012, Commission staff recommended that the Commission "should establish a joint task force with state, Tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way."[104] More recently, in January 2017, Chairman Pai announced that he would form a similar task force, the Broadband Deployment Advisory Committee ("BDAC"), to develop an administrative record and recommend best practices to accelerate wireless deployments.[105] The Commission should follow its own recommendation and approach these issues raised in the Public Notice through a joint task force.

The Commission should also note that issuing new or amended regulations at this time would be detrimental to any joint task force or advisory board, especially given that Chairman Pai intends his BDAC to "draft for the Commission's consideration a model code for broadband deployment."[106] Such a task force may not be able to engage in a robust review and discussion if it were formed after the Commission adopts new or amended regulations.

---

[104] *See* FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 131 (2012) *available at:* https://www.fcc.gov/general/national-broadband-plan.

[105] *See* Chairman Ajit Pai, *Formation of the Broadband Deployment Advisory Committee (BDAC)* (Jan. 31, 2017), *available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0131/DOC-343243A1.pdf [hereinafter "*BDAC Statement*"].

[106] *See BDAC Statement* at 1.

V. CONCLUSION

For the foregoing reasons, the Bureau should (1) refrain from additional or more restrictive rules that may exacerbate shot-clock gaming by the wireless industry and (2) consider simplified reforms to the initial application completeness review as described in Part II.C to these comments. Alternatively, the Bureau should consider more collaborative approaches to small cell deployment, such as a notice of inquiry and/or a joint task force.

Respectfully submitted,

Dated: March 8, 2017

Robert C. May III
Telecom Law Firm, PC

Javan N. Rad
Chief Assistant City Attorney
City of Pasadena

Counsel for League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities, and SCAN NATOA, Inc.

EXHIBIT A

Additional Comments by the California Street Light Association

(appears behind this cover)

EXHIBIT H

February 15, 2017

TO:	Michael Johnston, Legal Counsel, League of California Cities
FROM:	Jean A Bonander, Executive Director, California Street Light Association (CALSLA)
SUBJECT:	ROW Fee Petition (FCC WT Docket No. 16-421) re: Mobilitie

---

Thank you for the opportunity to comment on issues surrounding Mobilitie's attempts to use the public right of way to deploy small cell installations. Per your email, there are three categories of interest. The cities, counties and vendors who have commented at CALSLA about these issues are generally indicating the following concerns.

Unpermitted Work

CALSLA jurisdictions have so far not indicated that Mobilitie has tried to install small cell devices, poles or other infrastructure without permits.

Description of Equipment

CALSLA jurisdictions have indicated that Mobilitie representatives who have scheduled meetings with local government officials have not generally been able to provide the jurisdiction with accurately described or rendered equipment or specifications. In situations where drawings have been provided, e.g., the City of San José, the amount of additional equipment on the pole infrastructure for one carrier is substantial. Please see the attached drawing for clarification.

Misinformation

Several CALSLA jurisdictions have indicated that Mobilitie representatives have made the following kinds of statements about interactions with local governments:

- Mobilitie representatives schedule an initial meeting or inquire about applications and fees, then fail to follow up with a completed application.

EXHIBIT H

- Mobilitie representatives claim to have filed a completed application, and when the jurisdiction questions the allegation and asks for more information, Mobilitie representatives claim that the local government is delaying processing.

- Mobilitie representatives file an application, then fail to complete the process without comment to the local jurisdiction.

- Mobilitie representatives claim that no permit or application is required, that they are exempt from local regulations and on occasion, exempt from CEQA.

- Moblitie representatives have claimed that fees for processing an application are too high, with no further explanation.

Other Issues

The CALSLA Executive Committee, comprised of city and county representatives from around the state, would also like to suggest that the issues listed below are of concern and need additional attention by policy makers at the League of California Cities and the California State Association of Counties.

- Net Neutrality. In this instance, net neutrality means that the various competing private sector telecommunications companies need to come up with a common standard for attachment equipment so that multiple devices can be hosted at one facility location, like a street light pole or a wall-pak mount on a building.

- Migration Regulation. If new right of way infrastructure is required, e.g., an additional pole in the right of way, the telecommunications company shall agree to migrate its attachment device to a common/shared facility as soon as technically possible, and that any decommissioning costs are borne by the telecommunications company.

- Equal Access. Telecommunications companies should expect to be required to place their attachment devices throughout communities, making certain that all members of the community have equivalent access to the services that will be delivered by the company.

- Design Consideration and Quality of Life. If new right of way infrastructure, e.g., an additional pole must be installed in the public right of way, the jurisdiction's design guidelines, right of way access requirements and accessibility requirements must be maintained.

- Aesthetic and Reasonable Use of the Public Right of Way. Most right of way legislation was created in the early 1900's and, as use of the right of way has become more valuable to both communities and private sector vendors, it is important to preserve this asset for the most important and required services and facilities.

- Common Processing Requirements. To the extent possible, local jurisdictions, under the auspices of the League of California Cities and the California State Association of Counties, should quickly develop common application policies, fee schedules, review

guidelines and permitting procedures for small cell attachments to preempt Federal or State authorities from imposing inappropriate standards on local communities.

- Performance Bonds. Any telecommunications company wanting to add devices to the public right of way and/or local government infrastructure facilities shall post a performance bond for clean-up, decommissioning and/or for removal should the telecommunications company file for bankruptcy or otherwise abandon its assets.

- Coordination of Services. As is required of almost all vendors and interjurisdictional participants in projects, the telecommunications companies will coordinate their efforts with local jurisdictions on timing of construction, joint trenching and joint street openings/repairs to achieve economies of scale, minimize disruption to the public, and to expedite comprehensive project management.

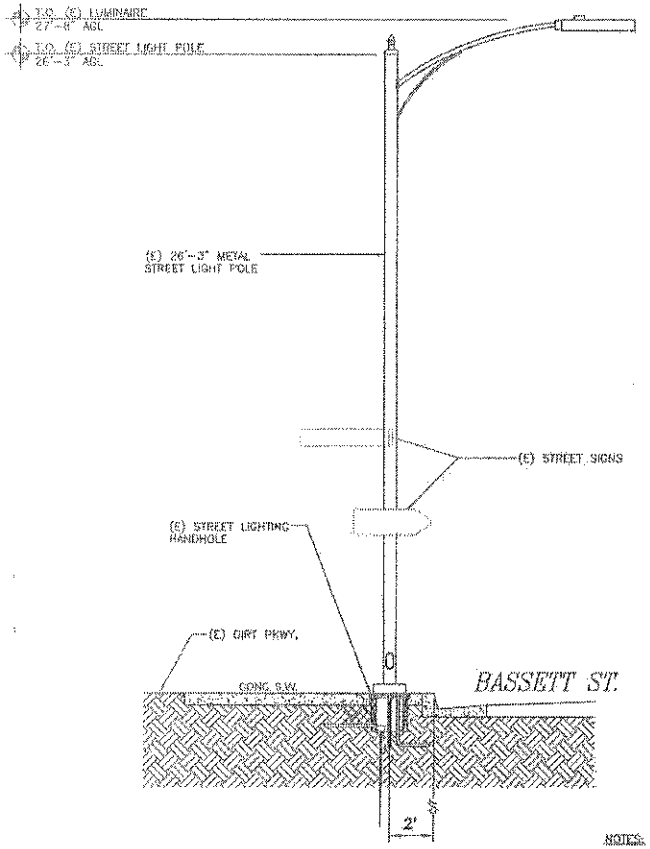
- Understanding of Impacts – Utility Owned Facilities (LS-1) and Customer Owned Facilities (LS-2). The issues of which entity permits, conducts environmental or design review, coordinates the construction/installation, receives revenue or fees, incurs expenses and the handling of decommissioning needs to be clarified between the investor owned utility (IOU) infrastructure and the customer owned (cities, counties, special districts) infrastructure.

I hope you find this information helpful. If CALSLA can be of additional assistance, please contact me.

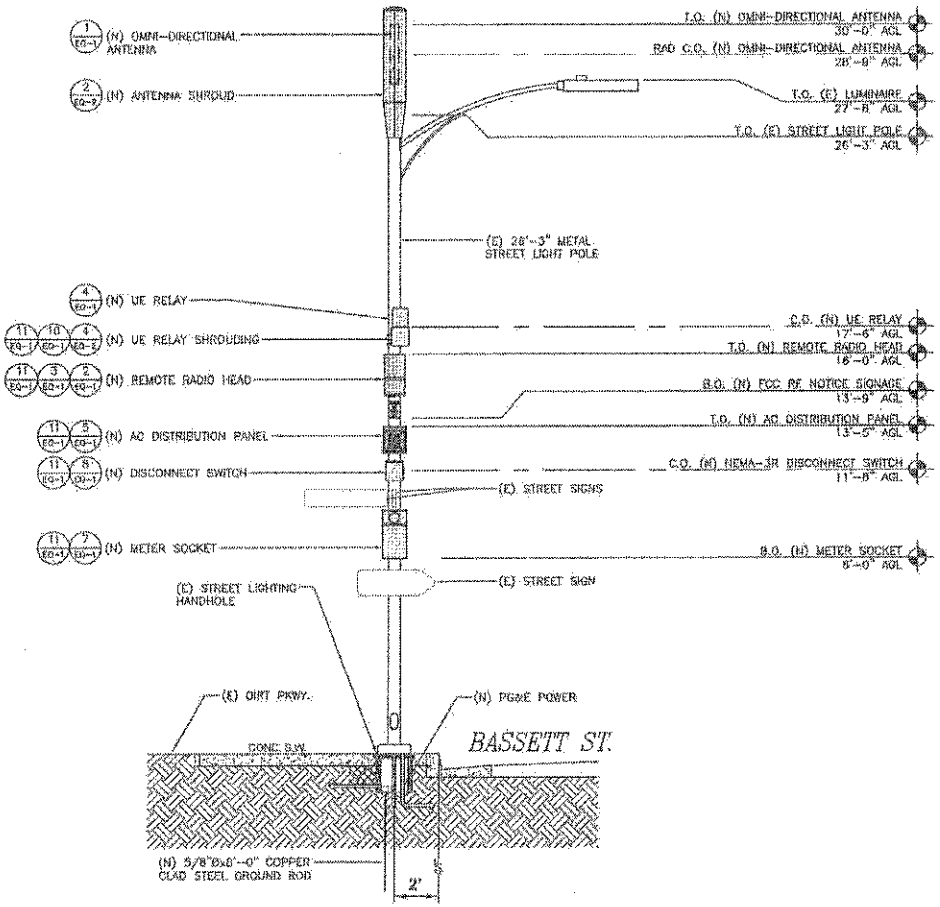
Attachment: City of San José Drawings/Mobilitie

Contact Information:

Jean A Bonander, Executive Director
California Street Light Association (CALSLA)
56 Hacienda Drive
Tiburon CA 94920-1127
jean@calsla.org
415-508-7527



EXISTING SIDE VIEW



NEW SIDE VIEW

NOTES:

1. ALL HARDWARE SHALL BE STAINLESS STEEL.
2. ALL CABLES SHALL BE SECURED TO POLE EVERY 36" OR LESS.
3. LIGHTNING RODS SHALL BE INCLUDED AS REQUIRED.
4. STRUCTURAL BACKFILL TO BE COMPACTED IN 6" MAXIMUM LAYERS TO 95% OF CONTENT IN ACCORDANCE WITH ASTM D698. ADDITIONALLY, STRUCTURAL BACKFILL MUST HAVE A MINIMUM COMPACTED UNIT WEIGHT OF 100 POUNDS PER CUBIC FOOT (16kN/m3)

(E) POLE ELEVATIONS

SCALE: 1" = 6'

1

CES cable engineering services
PRESCOTT COMMUNICATIONS INC.

PROJECT NO:	9CAB013787
DRAWN BY:	AH
CHECKED BY:	JM

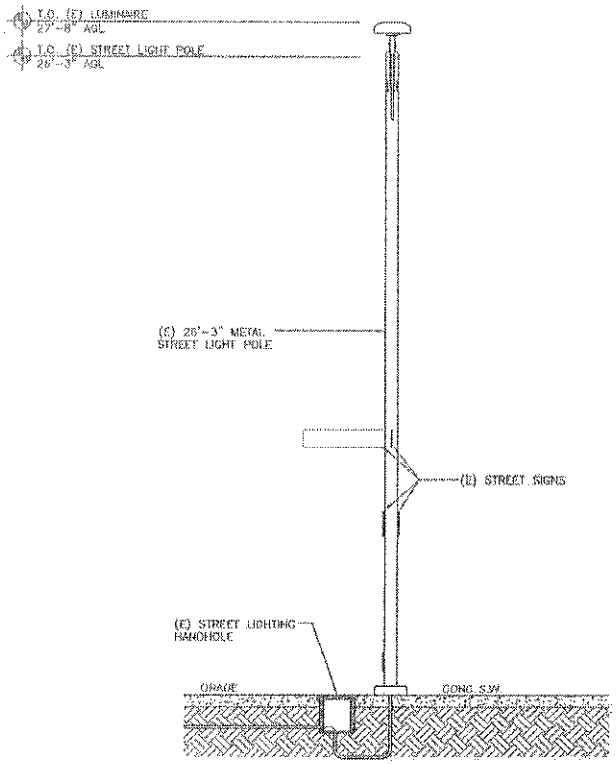
0	9/26/17	FOR CONSIDERATION

SITE ID: 9CAB013787
SAN JOSE, CA 95110
(E) 26'-3" METAL STREET LIGHT

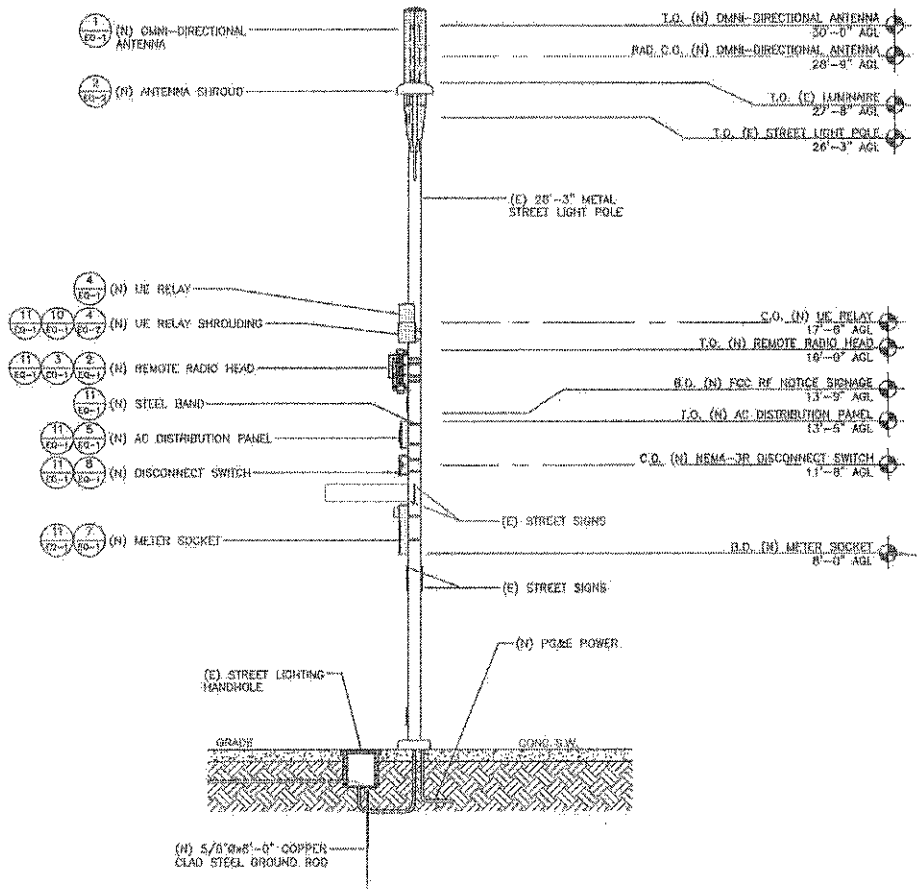
SHEET TITLE
POLE ELEVATIONS

SHEET NUMBER
EV-1

EXHIBIT H



EXISTING FRONT VIEW



NEW FRONT VIEW

NOTES:

1. ALL HARDWARE SHALL BE STAINLESS STEEL.
2. ALL CABLES SHALL BE SECURED TO POLE EVERY 36" OR LESS.
3. LIGHTNING RODS SHALL BE INCLUDED AS REQUIRED.
4. STRUCTURAL BACKFILL TO BE COMPACTED IN 8" MAXIMUM LAYERS TO 95% OF CONTENT IN ACCORDANCE WITH ASTM D698. ADDITIONALLY, STRUCTURAL BACKFILL MUST HAVE A MINIMUM COMPACTED UNIT WEIGHT OF 100 POUNDS PER CUBIC FOOT (16kN/m3)

(E) POLE ELEVATIONS

SCALE: 1" = 5'

1

cable engineering services
PRESCOTT COMMUNICATIONS INC.

PROJECT NO:	9CAB013787
DRAWN BY:	AH
CHECKED BY:	JM

0	6/16/17	90% SUBMISSION

SITE ID: 9CAB013787
SAN JOSE, CA 95110
(E) 26'-3" METAL STREET LIGHT

SHEET TITLE
POLE ELEVATIONS

SHEET NUMBER
EV-2

EXHIBIT H

EXHIBIT I

Affidavit of Don Neu

[appears behind this coversheet]

EXHIBIT I

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250
	)	RM-11849
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

AFFIDAVIT OF DON NEU

Don Neu declares as follows:

1. I have been employed by the City of Carlsbad for over thirty years and as City Planner for the last twelve years and eight months.
2. My duties as City Planner include supervising the intake and review of applications for new, collocated and modified personal wireless service facilities.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The WIA petition for declaratory ruling alleges that the City of Carlsbad requires a radio frequency report for local approval before it will consider an eligible facility request. The City of Carlsbad requires applicants to submit a radio frequency report with an application that demonstrates the proposed facility will comply with the FCC's guidelines for RF exposure. The City of Carlsbad does not require the radio frequency report for "local approval." Rather, it requires the radio frequency report in order to determine whether

the eligible facility request comports with federal requirements concerning radio frequency. An eligible facility request that comports with federal requirements concerning radio frequency will not be denied based on the radio frequency report.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at Carlsbad, California, October 28, 2019:

Don Neu
City Planner
City of Carlsbad

EXHIBIT J

Affidavit of Robert Smith

[appears behind this coversheet]

EXHIBIT J

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250
	)	RM-11849
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

AFFIDAVIT OF ROBERT SMITH

Robert Smith declares as follows:

1. Since September 1, 2007, I have been employed by Thurston County as a Senior Planner for the Thurston County Community Planning and Economic Development Department.

2. My duties as Senior Planner include the intake and review of applications for new, collocated and modified personal wireless service facilities.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. Because of my position with Thurston County, I am familiar with the special use permit fees charged by Thurston County in connection with wireless facilities.

5. The WIA petition claims that Thurston County imposes a $1,880.49 special use permit fee for every antenna equipment addition or swap. WIA's petition

also claims that the County's fees for special use permitting is not "cost-based." Both assertions are untrue. The purported fee amount is incorrect, and all land use application fees are supported by a Cost Recovery and User Fee Study, dated March 2007. Thurston County's fees represent the calculated average cost for reviewing particular types of applications.

6. The WIA petition for declaratory ruling alleges that Thurston County requires a radio frequency report for local approval before it will consider an eligible facilities request. The county requires applicants to submit a radio frequency report with an application that demonstrates the proposed facility will comply with the FCC's guidelines for RF exposure. The county does not require the radio frequency report for "local approval." Rather, it requires the radio frequency report in order to determine whether the eligible facilities request comports with federal requirements concerning radio frequency. An eligible facilities request that comports with federal requirements concerning radio frequency will not be denied based on the radio frequency report.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at Thurston County, Washington, on October 25, 2019:

Robert Smith
Senior Planner
Olympia, Washington

EXHIBIT K

Affidavit of Michael Kulish

[appears behind this coversheet]

EXHIBIT K

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250
	)	RM-11849
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

AFFIDAVIT OF MICHAEL KULISH

Michael Kulish declares as follows:

1. Since August 1, 2014, I have been employed by King County, Washington ("County") as Real Property Supervisor.

2. My duties as Real Property Supervisor include the intake and review of applications to install new, collocated and modified wireless service facilities in the public right-of-way.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The WIA petition for declaratory ruling alleges that the County requires a radio frequency report for local approval before it will consider an eligible facility request (EFR) application. The County does not require any radio frequency report, nor any "local approval" of such a report, as part of its EFR review process. After an EFR application is processed, the county does require that any authorized facility adhere to the Western Washington

EXHIBIT K

Cooperative Interference Committee (WWCIC) Engineering Standard No. 6 and shall not cause electromagnetic interference to wireless communication systems operated by King County. However, even then, no radio frequency report is required for local approval.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at Seattle, Washington, on October 28, 2019:

Michael Kulish
Real Property Supervisor
King County, Washington

EXHIBIT L

***Ex Parte* Communication / Notice of Meeting (July 17, 2017)**

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238) *et al.*

[appears behind this coversheet]

EXHIBIT L

KISSINGER & FELLMAN, P.C.

ATTORNEYS AT LAW
PTARMIGAN PLACE, SUITE 900
3773 CHERRY CREEK NORTH DRIVE
DENVER, COLORADO 80209
TELEPHONE: (303) 320-6100
TOLL FREE : 1-877-342-3677
FAX: (303) 327-8601
www.kandf.com

Colorado Office
RICHARD P. KISSINGER**
KENNETH S. FELLMAN*
JONATHAN M. ABRAMSON*
NANCY C. RODGERS*
BOBBY G. RILEY*
SURBHI GARG*
PAUL D. GODEC,* SPECIAL COUNSEL
**ADMITTED TO PRACTICE IN COLORADO AND TEXAS
*ADMITTED TO PRACTICE IN COLORADO

Maryland Office
LORI L. SHERWOOD, OF COUNSEL+
8403 COLESVILLE ROAD
SUITE 1100
SILVER SPRING, MD 20910
301-802-8176
+ADMITTED TO PRACTICE IN MARYLAND

July 17, 2014

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *In the Matter of: Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238); Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting (WC Docket No. 11-59); Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers (RM-11688 (terminated)); 2012 Biennial Review of Telecommunications Regulations (WT Docket No. 13-32)*
- ***Ex Parte Communication / Notice of Meeting***

Dear Ms. Dortch:

This firm represents the Colorado Communications and Utility Alliance ("CCUA"), the Rainier Communications Commission, the Cities of Tacoma and Seattle, Washington, King County, Washington, the Colorado Municipal League and the Association of Washington Cities. Our clients have filed Comments and Reply Comments in the above referenced docket.

On July 16, 2014, I, along with Arvada, Colorado City Council member Bob Fifer, and Todd Barnes, Communications Director of the City of Thornton, Colorado, and President of CCUA, attended meetings at the Commission with Renee Gregory, Legal Advisor to Chairman Tom Wheeler.

In this meeting, we discussed our clients' positions outlined in their Comments and Reply Comments advocating narrow definitions of key terms addressed in the NPRM, in accordance with the terms' generally understood meanings. We encouraged the Commission not to adopt rules that would restrict opportunities for government and industry to collaborate on creative, innovative solutions to difficult siting challenges. We provided examples of local government efforts to collaborate with industry to promote broadband deployment. We distributed (1) a list

of definitions that are being proposed by our clients, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, and numerous other local governments, and (2) a document with visual examples of creative wireless facilities siting in Colorado and Washington. Both documents are attached to this letter for entry into the record.

We provided examples of how a one-size-fits-all rule with black and white size criteria was inappropriate as a measure of what constitutes a "substantial change in physical dimensions" of a wireless tower or base station. For example:

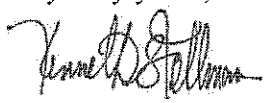
- A 15 foot increase in height may be an insubstantial change in the physical dimensions of a 160 foot tower, but would be a substantial change in the dimensions of a 35 foot tower located in a residential neighborhood.
- A 2 foot increase in the height of a tower may be insubstantial in the vast majority of cases, but would be substantial if the site were located adjacent to a local airport and the height increase caused the facility to violate FAA regulations.
- Adding an antenna array onto many towers may be unsubstantial, but would be quite substantial if the tower was originally approved as a camouflaged or stealth site, and the antenna array resulted in defeating the purposes of the original conditions of site approval.

We also advocated that the Commission not adopt a "deemed granted" remedy for reasons articulated in more detail in our Comments and Reply Comments. We also suggested that fundamental fairness requires that any alleged violations of new rules adopted by the Commission be addressed in local courts as opposed to the Commission, as many jurisdictions will not have the financial ability to retain special counsel and come to Washington, D.C. to defend local decisions.

Pursuant to Rule 1.1206 of the Commission's Rules, an electronic copy of this letter and the attached summary documents are being filed via the Electronic Comment Filing System (ECFS) in this matter.

Please feel free to contact me with any additional questions or concerns you may have.

Very truly yours,



Kenneth S. Fellman
kfellman@kandf.com

KSF/eaj

cc: Renee Gregory, Legal Advisor to Chairman Tom Wheeler
- (via email: renee.gregory@fcc.gov)

Honorable Bob Fifer, City of Arvada, CO
- (via email: bfifer@arvada.org)

Todd Barnes, President, CCUA
- (via email: todd.barnes@cityofthornton.net)

David Hinman, Rainier Communications Commission
- (via email: dhinman@co.pierce.wa.us)

Tony Perez, City of Seattle
- (via email: tony.perez@seattle.gov)

Alice Lawson, City of Seattle and King County
- (via email: alice.lawson@seattle.gov)

Christine Jaramillo, King County
- (via email: chris.jaramillo@kingcounty.gov)

Jeff Lueders, City of Tacoma
- (via email: jlueders@ci.tacoma.wa.us)

Geoffrey T. Wilson, General Counsel, Colorado Municipal League
- (via email: gwilson@cml.org)

Victoria Lincoln, Association of Washington Cities
- (via email: victorial@awcnet.org)

EXHIBIT L

In the Matter of:
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies
WT Docket No. 13-238; WC Docket No. 11-59; RM-11688 (terminated);
WT Docket No. 13-32

Submitted by:

Colorado Communications and Utility Alliance; Rainier Communications Commission; the Cities of Tacoma and Seattle, Washington; King County, Washington; the Colorado Municipal League and the Association of Washington Cities

LOCAL GOVERNMENT PROPOSED DEFINITIONS

"Collocation" means the mounting or installation of facilities on or at a legally permitted, existing wireless tower, having existing transmission equipment, for the purpose of providing wireless services.

"Wireless Tower" means any structure built for the sole or primary purpose of supporting FCC licensed or authorized antennas, including the cabling associated with that tower but not installed as part of a base station as defined herein; an "antenna" does not include unintentional radiators, mobile stations, or devices authorized under Part 15 of the Commission's rules.

"Transmission Equipment" means the antenna and electronic components of a base station that receive or transmit radio frequency signals for the purpose of providing wireless services.

"Base Station" means an apparatus located on-site at a wireless tower designed for the purpose of emitting and/or receiving radio frequency ("RF") transmissions from a fixed location to mobile stations pursuant to Commission license for the provision of wireless services, including the transmission equipment together with any other on-site equipment, switches, wiring, cabling, primary power sources, shelters or cabinets necessary for that base station to function and installed at a wireless tower as part of the original installation of the base station.

"Substantially Change the Physical Dimensions" means to alter the physical dimensions of a wireless tower or base station in a manner that has a significant impact given the surroundings, characteristics of, and any conditions on, the wireless tower or base station. The change in physical dimensions is compared against the physical dimensions of the wireless tower or base station as initially lawfully constructed.

"Physical Dimensions" include weight, height, width, visibility, depth or density.

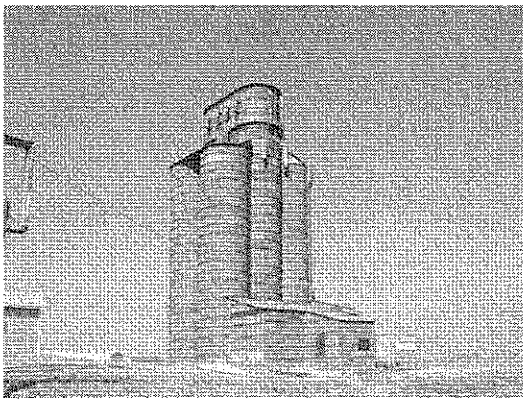
"Wireless Services" means "personal wireless services" as defined in 47 U.S.C. §332(c)(7)(C)(i) and wireless "public safety services."

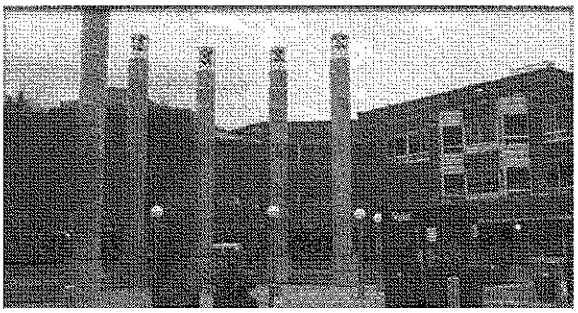
"Public Safety Services" has the same meaning as under 47 U.S.C. 1401(27).

Loveland, CO

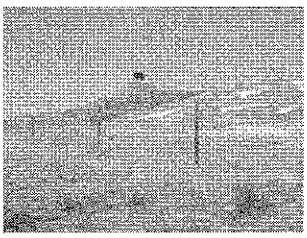
EXHIBIT L

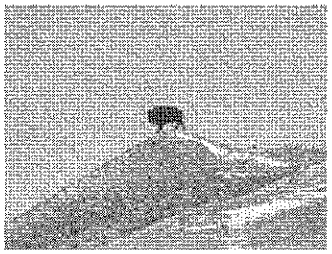
Kirkland, WA DAS system

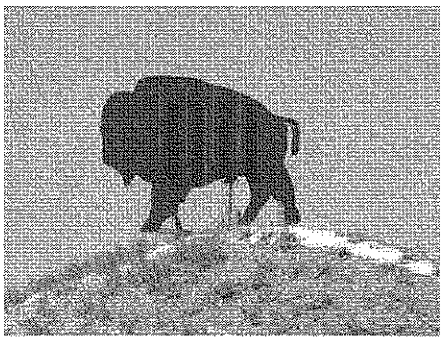




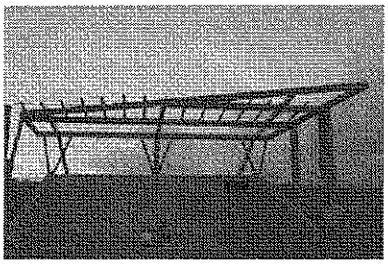
Carr, CO

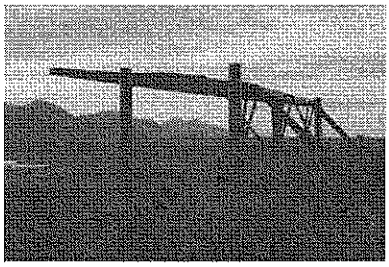


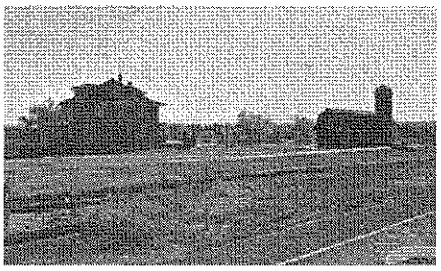


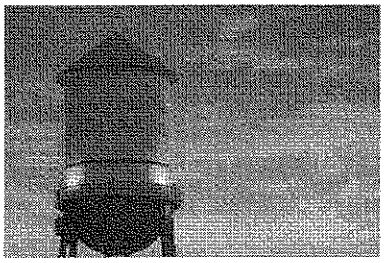


Arvada, CO









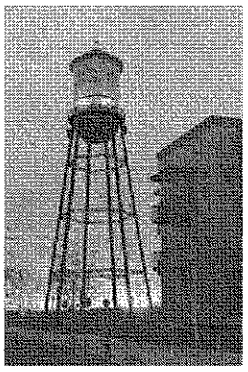


EXHIBIT M

Comments of the Colorado Communications and Utility Alliance, Rainier Communications Commission, Cities of Seattle and Tacoma, Washington, King County Washington, the Jersey Access Group and the Colorado Municipal League

In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (WT Docket No. 17-79)

[appears behind this coversheet]

EXHIBIT M

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Accelerating Wireless Broadband Deployment by	)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment	)	
	)	

COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

Kissinger & Fellman, P.C.
Kenneth S. Fellman
Brandon M. Dittman
3773 Cherry Creek North Drive, Suite 900
Denver, Colorado 80209
Telephone: (303) 320-6100
Facsimile: (303) 327-8601
kfellman@kandf.com
brandon@kandf.com

June 14, 2017

EXHIBIT M

SUMMARY

The Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County, Washington, the Jersey Access Group and the Colorado Municipal League (referred to as the "Local Governments") collectively represent the interests of local governments that are home to approximately ten million people. Our communities are truly diverse, and range from large and dense urban areas to extremely small, remote rural areas, and almost every other kind of community in between. The Local Governments provide their perspective to the Commission from both the east and west coasts, and the Rocky Mountain Region.

The Local Governments, like most of their counterparts around the country, support the deployment of broadband facilities of all kinds. We understand that deployment of wireless broadband networks is a piece of a much larger puzzle, and local governments generally are working hard to balance the many other responsibilities they are obligated to manage with the responsibility of facilitating the deployment of wireless broadband networks in a reasonable manner.

The information provided by these Local Governments in a recent docket[1] indicates that while many local government codes may not, at present, directly address the new and unique issue of siting wireless broadband in public rights-of-way (ROW), communities *have been proactive* in addressing these deployment issues, whether it involves changing local codes, negotiating ROW

[1] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421; Comments: https://ecfsapi.fcc.gov/file/10308895002297/Local%20Government%20Comments%20(WT%20Doc%20%20No%20%2016-421)%20(Small%20Cell%20Proceeding)%20(FINAL)%20(3-8-17).pdf; Reply Comments: https://ecfsapi.fcc.gov/file/104071412112067/Local%20Government%20Reply%20Comments%20(WT%20Doc%20%20No%20%2016-421)%20(Small%20Cell%20Proceeding)%20(FINAL)%20(4-7-17).pdf.

license agreements and processing permit applications. To the extent that wireless companies are seeking permission to locate facilities in the ROW (and many communities are *not* yet seeing this), the regulatory process is evolving and works relatively well. Many local governments have reached out to the wireless communications industry to assist in revisions to local regulations. Some have worked on model documents for deployment licenses and permitting that can be replicated in other communities. In many cases, the industry applicants have willingly stepped back to allow local governments to amend codes to address wireless broadband deployment issues in a collaborative manner. These local and regional activities have been successful at bringing the parties together to gain a better understanding of each other's legitimate interests.

Our information suggests that there is no national problem calling out for a federal solution with respect to local control over the siting of wireless broadband networks in our communities. It is true that the future deployment of 5G networks will require many more sites for wireless facilities. At the same time, there are literally hundreds of thousands of sites for wireless communications facilities that have already been permitted and deployed throughout the country. As an example, sources (including an industry source) claim between 216,000 and 308,000 sites in 2016.[2] This is not to say that siting cannot be improved. In the experience of these Local Governments there are both industry and government entities that occasionally "push the envelope" and whose activities may delay deployment. However, the total number of these "bad actor" activities is a tiny percentage of the total number of applications that have been processed successfully in the United States. There is no widespread national problem that the

[2] http://www.statisticbrain.com/cell-phone-tower-statistics/ (last visited June 10, 2017); https://www.ctia.org/docs/default-source/default-document-library/annual-year-end-2016-top-line-survey-results-final.pdf?sfvrsn=2 (last visited June 10, 2017).

Commission needs to step in and fix.

The Local Governments believe the Commission can play a positive role as a facilitator, although it must make a commitment to treat all parties as equals, and respect the longstanding efforts of localities to promote broadband deployment. The Commission must take great care not to pursue policies that pick winners and losers, as it appears to have done from a reading of the NPRM and NOI in this Docket. Further, the Local Governments believe that the Commission has limited legal authority to take regulatory action that limits or preempts local land use or ROW authority in connection with siting issues, and we support the arguments about the scope of that legal authority made by our national associations and other local government entities in their Comments in this Docket.

EXHIBIT M

TABLE OF CONTENTS

Page

EXHIBIT M

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Accelerating Wireless Broadband Deployment by	)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment	)	
	)	

COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

These Comments are filed by the Colorado Communications and Utility Alliance ("CCUA"), the Rainier Communications Commission ("RCC"), the cities of Tacoma and Seattle, Washington ("Tacoma" and "Seattle"), King County, Washington ("King County"), the Jersey Access Group ("JAG") and the Colorado Municipal League ("CML") (collectively referred to as "the Local Governments"), in response to the Commission's Notice of Proposed Rulemaking and Notice of Inquiry released April 21, 2017, in the above-entitled proceeding.[3]

I. INTRODUCTION

A. Background on the Local Governments.

CCUA was formed as a Colorado non-profit corporation in 2012, and is the successor entity to the Greater Metro Telecommunications Consortium. Its members have been working together since 1992[4] to protect the interests of their communities in all matters related to local

[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79 (FCC 17-38) (NPRM and NOI).

[4] The current members of CCUA are Adams County, Adams 12 Five Star Schools, Arapahoe County, Arvada, Aurora, Boulder, Brighton, Broomfield, Castle Pines, Castle Rock, Centennial, Cherry Hills Village, Columbine Valley, Commerce City, Dacono, Delta, Denver, Douglas County, Durango, Edgewater, Englewood, Erie, Federal

telecommunications issues. The CCUA undertakes education and advocacy in areas such as telecommunications law and policy, cable franchising and regulation, zoning of wireless communications facilities, broadband network deployment, public safety communications, rights-of-way management, and operation of government access channels. The CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors ("NATOA") and an affiliate of the Colorado Municipal League.

RCC is an intergovernmental entity formed under Washington law, comprised of Pierce County and 9 municipalities located within Pierce County.[5] Mount Rainier is located in the eastern part of Pierce County. To the west, Pierce County includes the Port of Tacoma, and the Narrows Bridge spanning Puget Sound, connecting Pierce County residents on the Gig Harbor Peninsula. RCC jurisdictions comprise an area of approximately 1,806 square miles, and represent a population of approximately 933,000 people. The RCC has existed since 1992 as an advisory body on matters relating to telecommunication for Pierce County and most of the cities and towns in Pierce County.

The City of Seattle, Washington has approximately 652,400 inhabitants on 84 square miles. A number of Seattle's distinct neighborhoods are made up of single-family residential homes. However, much of the population is concentrated in dense urban neighborhoods made up of apartment buildings and condominiums in the downtown area, around the University of Washington, and in other urban centers. Seattle's median annual household income is

---

Heights, Fort Collins, Frederick, Glendale, Golden, Grand Junction, Greenwood Village, Lafayette, Lakewood, Littleton, Lone Tree, Longmont, Louisville, Loveland, Montrose, Northglenn, Paonia, Parker, Sheridan, Southwest Colorado Council of Governments (SWCCOG), Thornton, Westminster, and Wheat Ridge.

[5] The members of RCC are Pierce County and the Cities of Sumner, Orting, Puyallup, Fife, DuPont, University Place, Ruston, Steilacoom and Carbonado.

approximately $64,129. Seattle has several lakes and borders two large bodies of water: Puget Sound on the west and Lake Washington on the east. The total water body area within Seattle is 3.42 square miles. Seattle owns its municipal electric, sewer, and water utilities. Seattle has several departments involved in the granting of permits and access to the rights-of-way that are referenced in these Comments. They include: Seattle City Light ("SCL"), Seattle Department of Transportation ("SDOT"), Seattle Public Utilities ("SPU"), the Department of Planning and Development and ("DPD") and the Department of Finance and Administrative Services ("FAS").

The City of Tacoma, Washington is located on the south end of Puget Sound, and is home to the sixth largest container port in North America. Named one of America's most livable communities, Tacoma is comprised of approximately 49 square miles and has a population of over 200,000 people.

Located on Puget Sound in Washington State, and covering 2,134 square miles, King County is nearly twice as large as the average county in the United States. With more than 2 million people, it also ranks as the 14th most populous county in the nation.

The Jersey Access Group (JAG) is a professional advisory organization of New Jersey local governments and school districts that informs, educates, and recommends in the areas of technology, legislation, and regulation that shape and direct the use of multi-communication platforms for content creators and distributors on behalf of municipalities, educational institutions, and other public media facilities. JAG was formed in March of 2000, and has played a dominant role in the development of New Jersey's public, educational, and government (PEG) television stations. As the New Jersey state chapter of NATOA and an affiliate of the New Jersey State League of Municipalities, JAG also educates and advocates on behalf of its members on

broadband and communications issues related to consumer protection, broadband access and funding, public safety spectrum, public rights-of-way management and policies and local government networks.

Founded in 1923, the Colorado Municipal League ("CML") is a nonprofit, nonpartisan organization providing services and resources to assist municipal officials in managing their governments and serving the cities and towns of Colorado. CML is the leading nonpartisan resource for municipal officials in Colorado, providing high quality resources and services that empower municipal governments to sustain strong, healthy, and vibrant cities and towns. CML represents Colorado cities and towns collectively through its advocacy, membership services, training, and research efforts.

B. Concern About the NPRM and NOI's Underlying Premise.

The Local Governments are concerned about the underlying premise of the NPRM and NOI, namely, that local and state government rights-of-way ("ROW") practices, wireless facilities siting regulations and fees charged for the use of the ROW play a significant and sometimes negative role in deployment of broadband facilities. There may in fact be some limited local government practices that negatively impact deployment. Likewise, there may in fact be some limited industry practices that negatively impact deployment. Reading through the NPRM and NOI, one finds dozens of paragraphs that reference alleged or potential negative practices of local government that the Commission should examine, as it decides taking action to limit these activities. There is only one paragraph in the NPRM and NOI where the Commission

acknowledges that there may be negative industry practices that impact deployment.[6] While an NPRM and NOI are the beginning of a process that may lead to Commission action, it cannot be denied that the NPRM and NOI in this Docket has set a table that is steeply tilted against the legitimate and longstanding principals of local control.

In addition, there is a complete lack of recognition of the public health and safety benefits of the local regulatory process. Local governments do not regulate in this area to cause problems for wireless deployment. Regulations lead to safe pathways for children to walk or bike to school and parks. It leads to control of traffic flows through particularly busy times of the day. It protects property adjacent to work areas, both public and private, and requires that entities undertaking that work do so in a responsible manner. And it also serves to strike a balance between promoting network deployment with all other critically important community goals and interests. There seems to be a belief in Washington, D.C. that local government regulation simply results in furthering a "not in my backyard" mentality. In the vast majority of cases, that bias is simply untrue. There is a significant difference between eliminating local authority so as to allow towers of any height in any part of the rights-of-way, regardless of the impact on property owners and property values, versus exercising local authority to, for example, mandate height limits consistent with local zoning regulations for all structures in the neighborhood, and require placement of vertical structures closer to lot lines where they will not impact sight lines from the front door of one's home. These are inherently local decisions. The NPRM and NOI do not seem to recognize that a wider array of community benefits may be lost, should the Commission create preemptory rules to benefit one industry, at the expense of all other community interests.

[6] NPRM and NOI, at ¶7.

II. RESPONSES TO NPRM

A. Introduction.

The Commission has asked many questions related to the siting of wireless facilities and the State, local and Tribal oversight and authority to address those issues in their communities. Many of the questions raised are quite similar to the questions raised in the Mobilitie petition and Public Notice.[7] The Local Governments filed Comments and Reply Comments in that docket, and we encourage the Commission to review those pleadings in connection with this Docket. Our Comments and Reply Comments there are attached as Exhibits A and B here. The time provided to respond to the NPRM and NOI does not allow the Local Governments to respond to every issue raised in the Docket related to wireless broadband deployment and local control, so we address here the issues we deem most critical.

B. Deemed Granted Remedy Issues.

Noting that Section 6409(a) of the Spectrum Act led to shot clock rules,[8] the Commission now asks whether Section 332(c)(7)(A)-(B) of the Telecommunications Act of 1996 (the Act) provides the authority for new shot clock rules.[9] Further, the Commission indicates that it intends to establish a "deemed granted" remedy for applications that relate to wireless facilities that are not covered by the mandatory collocations that Congress referred to in the Spectrum Act.[10] Yet, "[A]llegations that a state or local government has acted inconsistently with Section 332(c)(7) are

---

[7] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie Petition for Declaratory Ruling*, WT Doc. 16-421; Petition: https://ecfsapi.fcc.gov/file/122306218885/mobilitie.pdf; Public Notice: https://ecfsapi.fcc.gov/file/12222748726513/DA-16-1427A1.pdf.

[8] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (Spectrum Act), *codified at* 47 U.S.C. § 1455(a).

[9] NPRM and NOI ¶5.

[10] NPRM and NOI ¶8.

to be resolved ***exclusively by the courts*** (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission). Thus, other than in RF emissions cases, ***the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation***." (Emphasis added) The foregoing statement, taken directly from the Commission's website, has been the Commission's interpretation of Section 332 since the passage of the Act in 1996, through seven Commission chairs, from both political parties.[11] How can that law mean something else today?

The Commission has previously adopted a 90-day shot clock for collocation applications and a 150-day shot clock for other applications that are not mandatory collocations covered by the Spectrum Act and the Commission's 6409 rules.[12] Unlike the Spectrum Act, where Congress *specifically* preempted State and local laws related to a limited class of collocations, there is no authority given to the Commission under Section 332 for adoption of a deemed granted remedy.

To be clear, the "granting" of a land use application or a right of way permit is an inherently local or State decision. The federal government is not a zoning authority. It has no authority to control the terms of access and determine conditions applicable to construction in local rights of way. Even at the federal level, the Commission has no legal authority to grant authority to property owned by other federal agencies. Therefore, for the Commission to insert itself as the final decision maker over local or State land use and/or permitting issues, there must

[11] https://www.fcc.gov/general/tower-and-antenna-siting (last visited June 10, 2017)
[12] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009.

be direct authority granted by Congress to preempt these traditional areas of local and State authority or an ambiguity in the statute that the Commission has authority to interpret.[13]

The three options that the NPRM suggests provide legal authority to adopt a deemed granted remedy[14] will not withstand judicial scrutiny.

1. **Irrebuttable Presumption**: The 2009 Shot Clock Declaratory Ruling created the presumption that shot clock deadlines are reasonable.[15] The Commission suggests it can convert the rebuttable presumption in the shot clock rules into an irrebuttable presumption, and if a State or local government fails to act within the deadline it would result in the application being deemed granted.[16] However, this is not the case of interpreting ambiguous provisions of a federal statute, as was the case when the 2009 shot clock rules were adopted. The *City of Arlington* case does not support the Commission's suggestion here.[17] While the decision in that case is clear – the Commission has authority to adopt rules interpreting ambiguous statutory language – the issue in that case was the meaning of "a reasonable period of time." There is no ambiguity in the statute about what happens if a jurisdiction does not act within a reasonable period of time – the party impact by that failure to act has a specific judicial remedy.[18] Without specific authority from Congress permitting the Commission to step in, create its own remedies, and become the final decision maker in local and State land use and permitting decisions, the Commission may not adopt a deemed granted remedy for these kinds of applications.

---

[13] *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Wyeth v. Levine*, 555 U.S. 555 (2009).
[14] NPRM and NOI ¶9.
[15] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 38.
[16] NPRM and NOI at ¶10.
[17] *City of Arlington* v. FCC, 133 S. Ct. 1863 (2013).
[18] 47 U.S.C. § 332(c)(7)(B)(v).

The fact that the Fourth Circuit affirmed the 2014 Infrastructure Order and held that "deemed granted" remedy for the Spectrum Act is permissible under the Tenth Amendment,[19] is not relevant to this discussion. The Spectrum Act contained direct language of Congressional preemption, and the Commission simply interpreted under what circumstances that Congressional preemption would occur. There is no express preemption language in Section 332 that is analogous to the statutory authority supporting the Infrastructure Order which would support authority for a deemed granted remedy here.[20]

2. **Lapse of State and Local Authority:** The Commission also claims, without legal authority, that based on Section 332(c)(7)(A), if a locality fails to meet its obligations under Section 332(c)(7)(B)(ii), to act within a reasonable period of time, the State or local government would default its authority on the applications.[21] As noted above, there is a statutory obligation to act within a reasonable period of time and the Commission has determined what constitutes a reasonable period of time. Failure to act allows an applicant to seek a judicial remedy.[22] Even if the Commission could somehow identify what it means for another level of government to "default its authority," the statute already provides a remedy. There is no authorization for the Commission to step in and make a land use or permit decision.

3. **Preemption Rule**: The Commission asserts in the NPRM that Section 201(b) and 303(c) authorize the Commission to adopt rules or issue orders to carry out the substantive

[19] *Montgomery County v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015); NPRM and NOI ¶13.
[20] *Id.*
[21] NPRM and NOI ¶14
[22] *See*, footnote 19, *supra.*

provisions of the Communications Act.[23] Specifically, Section 303(r) directs the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, ***not inconsistent with law***, as may be necessary to carry out the provisions of this Act" (emphasis added). The Commission cannot preempt without clear direction from Congress or unless there is an ambiguous provision in the statute that needs to be interpreted. Under a *Chevron* deference analysis, any attempt to do so would be "inconsistent with law."[24] Here, however, the statute clearly provides a judicial remedy. As noted above, there is no authority for the Commission to insert itself as a zoning and permitting decision maker.

The Commission should carefully consider the unintended consequences of a broad deemed granted remedy, because from a policy standpoint, that remedy would be a terrible decision and result in actions contrary to the intent of the Commission and most State and local governments. A shot clock with a deemed granted essentially gives the wireless industry a special set of unique rules that will require State and local government to move them to the front of the application line. Some of our communities only have one or two planners. Even the larger communities are often in an understaffed position. When an application is made, in the vast majority of cases, the final action occurs within the existing shot clock time periods. But each case is fact specific. If an application comes in while staff is working on a Wal-Mart application, and new housing development, and a proposed highway project, under the existing shot clock rules, local governments usually work well with the industry applicant and mutually agree that a

[23] 47 U.S.C. §§ 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."), 303(r) (directing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"); NPRM and NOI ¶15.

[24] *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

reasonable amount of additional time can be taken to fairly balance the facts of the situation. With a deemed granted remedy looming, local governments will be encouraged to take an application, where sufficient time is not available to evaluate it, and schedule it for a formal decision of denial, simply to avoid the deemed granted federal remedy. The deemed granted remedy, even if the Commission had the authority to adopt it, would slow deployment, not speed it up.

4. **Deemed Granted Remedy under Sections 253 and 332 (c)(7)**: Neither Section 253 nor Section 332 (c)(7), standing alone or in conjunction with one another, gives the Commission the authority to enforce a deemed granted remedy. As noted in our more detailed discussion about the interaction between, and scope of authority within, Sections 253 and Section 332(c)(7), the Commission does not have the authority to adopt a deemed granted remedy either under the specific, unambiguous language of these sections, or alternatively, under any interpretation of ambiguous statutory language, although we believe none exists.[25]

C. Reasonable Period of Time to Act on Applications.

Noting that in 2009 the Commission decided the reasonable time period under Section 332(c)(7)(B)(ii) was 90 days for collocation applications and that 150 days is reasonable time for any other application to place, construct, or modify wireless facilities,[26] the Commission now suggests it should change the timeframe from 90 to 60 days.[27] Further, the Commission asks whether there should there be different presumptively reasonable time frames for narrowly

[25] *See*, Section III A, *infra*.

[26] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14004, 14012-13, paras. 32, 45-48 (2009) (*2009 Shot Clock Declaratory Ruling*), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013); NPRM and NOI ¶17.

[27] NPRM and NOI ¶18.

defined classes, such as new structures of 50 feet or less, between 50 and 200 feet, and taller than 200 feet. The Commission also raises questions about whether distinctions should be made for new structures in or near major utility or transportation rights of way, deployments in residential, commercial, or industrial areas, small cell/DAS facilities, and "batch" applications of multiple deployments by a single provider.[28]

We encourage the Commission not to tinker with the reasonable time limits in the shot clock rules for three reasons. First, the shot clock rules have worked reasonably well. During the NPRM that led to those rules, many government commenters, including some of the Local Governments represented here, advocated that there was no need for rules because the vast majority of local governments act within reasonable periods of time.[29] While there are always bad actors that cause problems in the application process – sometimes local governments and sometimes industry applicants – most of the time the process works well and there was no need for federal intervention. While we continue to believe that the 2009 shot clock rules were not necessary, we note there has not been much litigation over violations of those rules and thousands of applications have been approved since their adoption.

Second, the Commission should not aspire to become the national zoning authority, and it is clear that in proposing different standards for facilities of different heights, the Commission does not recognize all of the other land use issues that naturally flow from that kind of categorization. For example, if the Commission considers a different shot clock to address

---

[28] *Id.*

[29] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*; WT Docket No. 08-165; Comments: https://ecfsapi.fcc.gov/file/6520172718.pdf; Reply Comments: https://ecfsapi.fcc.gov/file/6520175609.pdf.

different structure heights, it will also need to consider the zoning district and the property classifications in which the application is sought. A 200-foot tower in a heavy industrial district may be acceptable as a use by right; in a residential district, it would require more extensive examination. There may be a separate level of review and scrutiny in a commercial retail zone, compared to a mixed-use residential/office/retail zone. Local officials are trained to work in these areas and have years of experience in doing so. The Commission does not possess the expertise or ability to evaluate sub-categories of land use designations that would need to be considered in developing the timing in which actions must be taken for facilities in each of these areas. It is overly simplistic, and contrary to good planning practices to consider only the height or size of a facility in making these decisions.

Third, many state legislatures have adopted or are considering state laws creating siting rules, including shot clocks, for deployments in their states. While these statutes create unified rules within the state, they necessarily differ state to state. After each of these state laws are passed, local government incur time and expense to modify local codes in order to comply with the new state mandates. Given the hundreds, if not thousands of localities that have been updating their codes to comply with new state laws, it would be burdensome and inappropriate for the Commission to impose new costs and expense on localities to change their codes yet again, to accommodate new and potentially conflicting federal rules. In addition, it is not likely that the Commission has the authority to preempt these state laws, especially before giving the states enough time to determine if their new laws are effective.

D. Pre-Application Issues.

The Commission notes that many land use codes provide for pre-application meetings, and suggests that these meetings should impact the application of the shot clocks.[30] These pre-application meetings occur in connection with many different land use matters, and are not in any way limited to broadband infrastructure. The purpose of these meetings is to give prospective applicants an opportunity to discuss code and regulatory provisions with local government staff, and gain a better understanding of the process that will be followed, in order to increase the probability that once an application is filed, it can proceed smoothly to final decision.

Sometimes a simple confirmation in a pre-application meeting that drawings need to be submitted on 24" by 36" sheets of paper as opposed to 18" by 24" (which might be the requirement in another jurisdiction) will save time after the application is made by avoiding initial rejection due to submission of incorrectly sized documents. The Commission should understand that these pre-application meetings serve a valuable purpose prior to a formal application being submitted. At times applications are filed shortly after these meetings and at times a prospective applicant may take months after a pre-application meeting before it files its formal application. The Commission should not rule that shot clock time periods commence ***before an application is even filed***. Such a rule would essentially start the time period to act on an application, when there is no application to consider.

[30] NPRM and NOI ¶20.

EXHIBIT M

III. RESPONSES TO NOI

A. Relationship Between Sections 253 and 332(c)(7).

The Commission asks for comment on the required balance between Congress's "intent to streamline regulations for broadband facilities under Sections 253 and 322(c)(7) of the Telecommunications Act while balancing the long-standing role that State and local authorities play with respect to land-use decisions."[31] While it is arguably the intent of Congress in Sections 253 and 332(c)(7) to ensure comparable treatment of entities seeking access to rights of way, and ensuring that local regulations do not prohibit or have the effect of prohibiting the provision of service, it is a misreading of the statute to claim that the language of these two sections display a Congressional intent to "streamline regulations."

Section 253(a) states that "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service."[32] Given the Commission's efforts to reclassify broadband service as a Title I service, and the plain language of Section 253(a) which refers only to "telecommunications service," it is clear that Section 253(a) does not even apply to wireless broadband infrastructure. Wireless broadband service is not (unless it is used as a substitute for land line provider of last resort service), according to the Commission, and according to many states that have deregulated broadband services, a Title II telecommunications service.[33] Section 332(c)(7) generally preserves State and local governments' "authority . . . over

[31] NPRM and NOI ¶87.
[32] 47 U.S.C. § 253(a).
[33] *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-5, ¶ 29.

decisions regarding the placement, construction, and modification of personal wireless service facilities,"[34] and create limited exceptions for federal preemption of that State and local authority.

The Commission asks whether there is a reason to conclude that the substantive obligations of the two Sections differ, and if so, in what way?[35] As noted above, Section 253, appearing in Title II of the Communications Act, by its own terms applies to "telecommunications services." The wireless broadband services that are the subject of this Docket are not, according to the Commission, telecommunications services. In addition, many applicants for rights of way access of not providers of any kind of service – they are simply infrastructure owners, that seek low or no cost access to public property in order to deploy vertical infrastructure to lease to third parties. While they may own wireless facilities and therefore be covered under Section 332 (c)(7), they are not service providers and Section 253 has no application to these entities. Therefore, the answer to the Commission's question as to whether a locality exceeding jurisdiction over access to rights of way by denying a wireless facilities application[36] violates both sections of the statute is 'no,' because the wireless facilities application does not relate to Title II services and Section 253 does not apply.

In addition to the foregoing, the Local Governments here are familiar with the interpretation of these issues promulgated by the League of Arizona Cities and Towns, the League of California Cities and the League of Oregon Cities in their Comments in this Docket, and we commend that position to the Commission.

---

[34] 47 U.S.C. § 332(c)(7)(A).
[35] [35] NPRM and NOI ¶89.
[36] *Id.*

B. Prohibit or Have the Effect of Prohibiting.

The Commission notes that the courts have not been consistent with how they interpret Sections 253(a) and 332(c)(7).[37] The Local Governments strongly believe that an applicant must show direct and specific evidence that a local regulation has the effect of prohibiting service, before it violates the Act. We commend the Commission to the positions taken by the New York City Department of Technology and Telecommunications in the letter from General Counsel Michael Pastor in WT Docket No. 17-79, filed April 12, 2017.[38] To simply make a theoretical showing that a regulation may, under some potential set of facts that may or may not ever occur, have the effect of prohibiting service, obliterates the Congressional directive in Section 332(c)(7) preserving most State and local land use authority.

C. Aesthetic Considerations.

The Commission asks whether it should provide more specific guidance on how to distinguish legitimate denials based on aesthetic impacts and mere "generalized concerns."[39] For similar reasons as noted above about the Commission being ill-equipped to serve as a national zoning board, the answer is 'no.' Aesthetic concerns often relate to how a potential site impacts view corridors. The view corridor for a wireless site on a seldom traveled, basically flat two-lane road that has a view of the Jersey shore may be evaluated in a different way than the view corridor in mountainous terrain of a scenic viewing area for Mt. Rainier or a popular wildlife habitat viewing area in Estes Park, Colorado outside of Rocky Mountain National Park. And none of those view corridors may be addressed similarly to the views within the Twin Towers Memorial

[37] NPRM and NOI ¶90.
[38] *Id.*
[39] NPRM and NOI ¶92.

in New York City or Pike's Place Market in Seattle. It is simply unreasonable to believe that the Commission can come up with a one-size-fits all rule that would dictate the only federally-approved way that localities can address aesthetic concerns when structures are proposed within their communities.

The Local Governments do have a suggestion for the Commission, if it believes that it should make these kinds of dictates to other governmental entities regarding aesthetic issues. The Commission should first attempt to impose its judgment in this area first on other federal landowners. After developing rules addressing how to deal with aesthetic concerns in connection with siting wireless facilities, the Commission should seek consensus on such a singular approach from agencies likes the Department of the Interior and National Parks Service, the Bureau of Land Management, the Department of Transportation, the Department of Energy, and the Department of Housing and Urban Development. Until a Commission framework is agreed to by these federal agencies, and there has been a reasonable period of time in which to evaluate its effectiveness, the Commission should refrain from making this kind of determination for over 36,000 units of local government and each of the fifty states.

D. Fees.

With respect to whether wireless siting applications pay fees comparable to those paid by other parties for similar applications,[40] the Local Governments can say unequivocally, 'yes' – except in the instances where state laws require local taxpayers to subsidize broadband companies using public rights of way, and allow them to pay ***less*** than what is paid by other parties.

[40]NPRM and NOI ¶93.

Application fees are based upon recovery of costs incurred by localities. These fees usually estimate the staff time involved in addressing an application, and can include time for planning review, public works review, outside experts, drainage studies, traffic studies, parking analysis, etc. Obviously, an application for sites in the rights of way will not involve parking, so in that case, a wireless applicant will pay less than the applicant for a shopping center approval. Depending upon the site, a wireless applicant may or may not need to address costs of a drainage evaluation by an expert. Similarly, a housing development will not need to provide a report from a radio frequency engineer indicating that the project will comply with federal RF emission standards. However, the fees in each case are tied to the costs of review and evaluation.

Some state laws, while recognizing that in other kinds of applications the local government is entitled to charge fees that provide full cost recovery, specifically give a subsidy to broadband providers and restrict local governments to "less than full cost recovery."[41] The questions in the NOI presuppose that local government fees for wireless site applications and rights of way access are always higher than fees imposed on other business in other types of applications. Here again, the Commission demonstrates an assumption that local government is a bad actor negatively impacting deployment, when in fact, the industry has already won for itself special, lower cost treatment from state legislatures. Instead of assuming local governments are the problem, the Commission might study whether there is more deployment and more competition for broadband service in Colorado as a result of the state grant of these special subsidies to one industry in 1996. When compared to other states without such limitations, the

[41] Colo. Rev. Stat. 38-5.5-101, et. seq. *See also*, *Plains Coop. v. Washington Bd. of County Comm'rs*, 226 P.3d 1189 (Colo. App. 2009).

findings would be that there is no measurable additional broadband or more competition due to these special rules for the broadband industry.

E. Recurring Fees on Other Publically Owned Land.

The Commission seeks comment on restrictions imposed by State and local governments on siting wireless facilities on publicly owned land that is not part of the rights of way.[42] It should avoid intrusion into this area. Local and State government has for years had the ability to determine whether to make public property available for lease, and to freely negotiate the value of that property, just as private property owners may do. Any attempt to restrict that authority would be in improper taking of state and local property by the federal government without compensation, in violation of the Fifth Amendment.[43]

Many localities, like Westminster, Colorado, choose to lease property at some of its fire stations for towers to house antennas and related equipment for the provision of wireless services. The Commission has no authority to tell the City what it can charge any more than it can direct the City to make all of its fire stations available for these structures. Similarly, in Breckenridge, Colorado, Comcast holds a franchise to provide cable services and pays a 5% franchise fee – the maximum amount allowable under federal law. In addition, Comcast leases land from the Town for its headend and negotiates commercially appropriate terms for that lease in an arm's length transaction. The Commission cannot tell a town whether to lease property for a cable headend and the lease rates to be charged, and it cannot direct a town whether and how to lease property for siting wireless facilities. In this regard, the Commission's authority is no different than its

[42] NPRM and NOI ¶94.
[43] *Arkansas Game & Fish Commission v. United States of America*, 133 S. Ct. 511 (2013); U.S. CONST. amend. V.

authority to direct private property owners to lease their property to wireless facilities owners at Commission-set fees. Such a directive might speed deployment of wireless broadband networks. There is simply no legal authority for the Commission to engage in these practices.

F. Regulatory versus Proprietary Capacity.

Noting that in the 2014 Infrastructure Order, the Commission opined that the Spectrum Act and rules apply to localities' actions in their capacities as land-use regulators, but not when acting as managers in their proprietary roles,[44] it now asks whether Sections 253(a) and 332(c)(7) impact localities in their proprietary roles, and whether to reaffirm or modify that finding in the 2014 Infrastructure Order. It should not.

A government is acting in its regulatory capacity when it is imposing requirements that are applicable to all similarly situated entities. Entities that want to build in a community are all subject to local zoning. Entities working in the rights of way that need to excavate in the streets are all subject to requirements imposing standards of repair and warranties, insurance, bonds, etc. When government owns property however, the decision to sell, lease, license or grant other possessory rights in that government property is (barring specifically authorized federal preemption under established legal criteria, or state preemption of a state's political subdivisions) a purely local decision. Just as the lease of a private parcel might have been concluded for a fair market price of $1500/month in 2000, a similar property today may be worth $2500/month. Publicly owned lands are no different and the Commission lacks the legal authority to insert itself into these transactions.

[44] NPRM and NOI ¶96, citing *2014 Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 239-40.

With respect to how the Commission should draw a line between the two in the context of properties such as rights of ways, government-owned lampposts or utility conduits, we again suggest that the Commission first work through these issues with federal property owners. Would the Commission dictate to the National Parks Service what it must do in these circumstances? We reiterate the suggestion we made in Exhibits A and B, and that the Commission's Intergovernmental Advisory Committee made in its 2016 report on wireless facilities siting. Educational efforts from the Commission, and collaboration with all affected parties in a manner that respects the legitimate interests of all parties, is the most appropriate legal and policy avenue for Commission action.

G. Unreasonable Discrimination.

The Commission suggests that there may be State or local regulations that target telecom-related deployment more than non-telecom deployments.[45] Rather than address this question in a balanced manner, the Commission proceeds to assume that local regulations are a problem, and asks to what extent localities seek to restrict the deployment of utility or communications facilities above ground and attempt to relocate electric, wireline telephone, and other utility lines in the area to underground conduits.[46] It should be noted first that state laws create unreasonable discrimination by providing broadband companies ***easier access*** to local rights of way,[47] by restricting what local governments can charge while in some cases maintaining for states the rights to impose what charges the state determines,[48] and granting "use by right" status to wireless

[45] NPRM and NOI ¶97.
[46] NPRM and NOI ¶98
[47] Colo. Rev. Stat. 38-5.5.101, et seq.; RCW 35-99; N.J.S.A. 54:30A-124.
[48] Colo. Rev. Stat. 38-5.5-101.

broadband facilities in all zoning districts – a land use privilege not afforded any other property owner.[49] Rather than assuming that the wireless industry is being treated worse by local governments than other property owners, the Commission should take a careful look at these and numerous other state laws that give the wireless industry special privileges not afforded other property owners. The fact that the Commission remains concerned that broadband deployment is not occurring quickly enough (as do the Local Governments) suggests that more subsidies and special rules for the industry is not going to solve that problem.

Finally, with respect to undergrounding, this is another area of traditional State and local control. Good planning principles dictate that in new developments and redevelopments utility infrastructure should be placed underground. The only above ground facilities are usually street lights and traffic signals. In effect, wireless broadband facilities in the rights of way, to the extent new, stand-alone poles are required, runs 180 degrees contrary to good planning principles.

The Local Governments recognize that a balance needs to be struck, and indeed, many of these Local Governments have amended their codes or are in the process of amending their codes, to allow for attachments to existing infrastructure and where appropriate, placement of new, stand-alone poles to house wireless infrastructure. At the same time, whenever a community determines it is appropriate to underground older, unsightly utility poles and wires, it should have the continued ability to do so without federal intrusion. In these cases, localities work with the wireless industry to find alternatives. There is no evidence of a widespread national problem suggesting that local undergrounding policies have had or will have a significant negative impact

[49] Colorado House Bill 17-1193, Approved April 18, 2017, Section 4, amending Colo. Rev. Stat. 29-27-404 by adding a new subsection (3).

on the deployment of wireless networks. Further, in response to the question whether the Communications Act applies to undergrounding,[50] we would suggest that it does not. This is a completely separate area of local authority and intrusion into this area by the Commission is not authorized by the Title 47.

IV. CONCLUSION

We encourage the Commission to carefully review Exhibits A and B to these Comments. We encourage the Commission to follow the recommendations of its Intergovernmental Advisory Committee, as described in the July 12, 2016 Report on Siting Wireless Communications Facilities.[51] We urge the Commission to tilt the playing field upon which this debate is occurring back to a more level, balanced discussion between the legitimate rights and interests of all interested parties. We ask the Commission to recognize the clear remedies in Section 332 (c)(7), which do not allow the Commission to legislate new remedies not authorized by Congress. Finally, we thank the Commission for considering all of our positions asserted in this Docket.

[50] NPRM and NOI ¶98

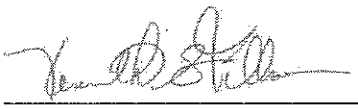
[51] https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf

EXHIBIT M

Respectfully submitted this 14th day of June, 2017.

THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF TACOMA AND SEATTLE, WASHINGTON, KING COUNTY, WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

Kissinger & Fellman, P.C.

By: 

Kenneth S. Fellman
Brandon M. Dittman
3773 Cherry Creek North Drive, Suite 900
Denver, Colorado 80209
Telephone: (303) 320-6100
Facsimile: (303) 327-8601
kfellman@kandf.com
brandon@kandf.com

EXHIBIT N

Comments of the Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County Washington, the Jersey Access Group and the Colorado Municipal League

In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies

[appears behind this coversheet]

EXHIBIT N

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

Kissinger & Fellman, P.C.
Kenneth S. Fellman
Brandon M. Dittman
3773 Cherry Creek North Drive, Suite 900
Denver, Colorado 80209
Telephone: (303) 320-6100
Facsimile: (303) 327-8601
kfellman@kandf.com

March 8, 2017

EXHIBIT N

SUMMARY

The Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County, Washington, the Jersey Access Group and the Colorado Municipal League (referred to as the "Local Governments") collectively represent the interests of local governments that are home to approximately ten million people. Our communities are truly diverse, and range from large and dense urban areas to extremely small, remote rural areas, and almost every other kind of community in between. The Local Governments provide their perspective to the Commission from both the east and west coasts, and the Rocky Mountain Region.

The Local Governments, like most of their counterparts around the country, support the deployment of broadband facilities of all kinds. We understand that deployment of small cell networks are a piece of a much larger puzzle, and local governments generally are working hard to balance the many other responsibilities they are obligated to manage with the responsibility of facilitating the deployment of small cell networks in a reasonable manner.

The information provided by these Local Governments indicates that while many local government codes may not, at present, directly address the new and unique issue of siting small cell facilities in public rights-of-way (ROW), communities *have been proactive* in addressing these deployment issues, whether it involves changing local codes, negotiating ROW license agreements and processing permit applications. To the extent that wireless companies are seeking permission to locate facilities in the ROW (and many communities are *not* yet seeing this), the regulatory process is evolving and works relatively well. Many local governments have reached out to the wireless communications industry to assist in revisions to local regulations. Some have

worked on model documents for deployment licenses and permitting that can be replicated in other communities. In many cases, the industry applicants have willingly stepped back to allow local governments to amend codes to address small cell deployment issues in a collaborative manner. These local and regional activities have been successful at bringing the parties together to gain a better understanding of each other's legitimate interests.

Our information suggests that there is no national problem calling out for a federal solution with respect to local control over the siting of small cell networks in our communities. The Local Governments believe the Commission can play a positive role as a facilitator, although it must make a commitment to treat all parties as equals, and respect the longstanding efforts of localities to promote broadband deployment. The Commission must take great care not to pursue policies that pick winners and losers. Further, the Local Governments believe that the Commission has limited legal authority to take regulatory action that limits or preempts local land use or ROW authority in connection with siting issues, and we support the arguments about the scope of that legal authority made by our national associations and other local government entities in their Comments in this Docket.

EXHIBIT N

TABLE OF CONTENTS

Page

EXHIBIT N

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

These Comments are filed by the Colorado Communications and Utility Alliance ("CCUA"), the Rainier Communications Commission ("RCC"), the cities of Tacoma and Seattle, Washington ("Tacoma" and "Seattle"), King County, Washington ("King County"), the Jersey Access Group ("JAG") and the Colorado Municipal League ("CML") (collectively referred to as "the Local Governments"), in response to the Wireless Telecommunications Bureau's Public Notice released December 22, 2016, in the above-entitled proceeding.[1]

I. INTRODUCTION

A. Background on the Local Governments.

CCUA was formed as a Colorado non-profit corporation in 2012, and is the successor entity to the Greater Metro Telecommunications Consortium. Its members have been working

[1] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421 (WTB 2016) (Public Notice).

together since 1992[2] to protect the interests of their communities in all matters related to local telecommunications issues. The CCUA undertakes education and advocacy in areas such as telecommunications law and policy, cable franchising and regulation, zoning of wireless communications facilities, broadband network deployment, public safety communications, rights-of-way management, and operation of government access channels. The CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors ("NATOA") and an affiliate of the Colorado Municipal League.

RCC is an intergovernmental entity formed under Washington law, comprised of Pierce County and 9 municipalities located within Pierce County.[3] Mount Rainier is located in the eastern part of Pierce County. To the west, Pierce County includes the Port of Tacoma, and the Narrows Bridge spanning Puget Sound, connecting Pierce County residents on the Gig Harbor Peninsula. RCC jurisdictions comprise an area of approximately 1,806 square miles, and represent a population of approximately 933,000 people. The RCC has existed since 1992 as an advisory body on matters relating to telecommunication for Pierce County and most of the cities and towns in Pierce County.

The City of Seattle, Washington has approximately 652,400 inhabitants on 84 square miles. A number of Seattle's distinct neighborhoods are made up of single-family residential homes. However, much of the population is concentrated in dense urban neighborhoods made up

[2] The current members of CCUA are Adams County, Adams 12 Five Star Schools, Arapahoe County, Arvada, Aurora, Boulder, Brighton, Broomfield, Castle Pines, Castle Rock, Centennial, Cherry Hills Village, Columbine Valley, Commerce City, Dacono, Delta, Denver, Douglas County, Durango, Edgewater, Englewood, Erie, Federal Heights, Fort Collins, Frederick, Glendale, Golden, Grand Junction, Greenwood Village, Lafayette, Lakewood, Littleton, Lone Tree, Longmont, Louisville, Loveland, Montrose, Northglenn, Paonia, Parker, Sheridan, Southwest Colorado Council of Governments (SWCCOG), Thornton, Westminster, and Wheat Ridge.

[3] The members of RCC are Pierce County and the Cities of Sumner, Orting, Puyallup, Fife, DuPont, University Place, Ruston, Steilacoom and Carbonado.

of apartment buildings and condominiums in the downtown area, around the University of Washington, and in other urban centers. Seattle's median annual household income is approximately $64,129. Seattle has several lakes and borders two large bodies of water: Puget Sound on the west and Lake Washington on the east. The total water body area within Seattle is 3.42 square miles. Seattle owns its municipal electric, sewer, and water utilities. Seattle has several departments involved in the granting of permits and access to the rights-of-way that are referenced in these Comments. They include: Seattle City Light ("SCL"), Seattle Department of Transportation ("SDOT"), Seattle Public Utilities ("SPU"), the Department of Planning and Development and ("DPD") and the Department of Finance and Administrative Services ("FAS").

The City of Tacoma, Washington is located on the south end of Puget Sound, and is home to the sixth largest container port in North America. Named one of America's most livable communities, Tacoma is comprised of approximately 49 square miles and has a population of over 200,000 people.

Located on Puget Sound in Washington State, and covering 2,134 square miles, King County is nearly twice as large as the average county in the United States. With more than 2 million people, it also ranks as the 14th most populous county in the nation.

The Jersey Access Group (JAG) is a professional advisory organization that informs, educates, and recommends in the areas of technology, legislation, and regulation that shape and direct the use of multi-communication platforms for content creators and distributors on behalf of municipalities, educational institutions, and other public media facilities. JAG was formed in March of 2000, and has played a dominant role in the development of New Jersey's public,

educational, and government (PEG) television stations. As the New Jersey state chapter of NATOA and an affiliate of the New Jersey State League of Municipalities, JAG also educates and advocates on behalf of its members on broadband and communications issues related to consumer protection, broadband access and funding, public safety spectrum, public rights-of-way management and policies and local government networks.

Founded in 1923, the Colorado Municipal League ("CML") is a nonprofit, nonpartisan organization providing services and resources to assist municipal officials in managing their governments and serving the cities and towns of Colorado. CML is the leading nonpartisan resource for municipal officials in Colorado, providing high quality resources and services that empower municipal governments to sustain strong, healthy, and vibrant cities and towns. CML represents Colorado cities and towns collectively through its advocacy, membership services, training, and research efforts.

A number of member jurisdictions from each of the Local Government commenters here have provided information for these Comments, and are briefly described in Sections II and III, *infra*.

B. Concern About the PN's Underlying Premise

The Local Governments are concerned about the underlying premise of the PN, namely, that local and state government rights-of-way ("ROW") practices, wireless facilities siting regulations and fees charged for the use of the ROW play a significant and sometimes negative role in deployment of broadband facilities. In these Comments, the Local Governments will describe their own practices and experiences, which demonstrate that ROW and facilities siting

practices as well as proactive activities undertaken by local governments have been directed to facilitate the deployment of wireless facilities in the ROW.

Further, we are particularly concerned with the Commission's representation in the PN that it was summarizing "information gathered from public sources regarding new and emerging wireless technologies and services, and we discuss the progress of deploying infrastructure needed to supply such services and satisfy consumer demand.[4]" The Commission then referenced additional information about local government siting processes which first criticized local processes for delay, citing allegations in materials that do not identify a single local government by name or the specific regulations supporting the basis of the allegations.[5]

In referencing this gathering of information from public sources, the Commission failed to reference its own Intergovernmental Advisory Committee ("IAC"), which was created to facilitate communication, education and sharing of information between the Commission and State, local and Tribal governments. In 2015 and 2016, at the direction of the Commission, the IAC devoted considerable time and effort on developing a white paper addressing the very issues that are identified in the PN. Despite the fact that this IAC work is readily available on the Commission's own website,[6] the PN failed to incorporate any of its information. We hope this was an inadvertent oversight, and urge the Commission to use the IAC's work product as a foundational starting point for the issues being considered here.

---

[4] PN at pages 2-3.
[5] PN at pages 7-8, notes 44-49.
[6] Report on Siting Wireless Communications Facilities. https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf. Last visited, February 25, 2017.

II. DETERMINING HOW LOCAL LAND-USE REGULATIONS OR ACTIONS AFFECT WIRELESS DEPLOYMENT

A. Macro Sites

All of the Local Governments commenting here, with the exception of JAG, filed joint Comments and Reply Comments in the proceeding that the Commission has referred to as the 2014 Infrastructure Order.[7] In that Docket, the Local Governments provided specific examples of how siting for wireless facilities works in their communities. Those Comments and Reply Comments demonstrated that, for these Local Governments and the industry applicants in our communities, the process is reasonable and works well.[8] Rather than repeated those specific examples here, we refer the Commission to our Comments and Reply Comments in the 2014 Infrastructure Order Docket.

B. Small Cells/Siting in Public Rights-of-Way

1. Demand for Small Cell Sites from Providers

While some of our jurisdictions have seen a moderate demand for permits to allow the siting of small cell facilities, others have seen no interest at all. Some of our jurisdictions that have been approached by entities seeking to site small cell facilities, have taken proactive steps to facilitate a regulatory framework for this deployment, and then have never heard back from the wireless provider.

---

[7] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014), erratum, 30 FCC Rcd 31 (2015), *aff'd, Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).
[8] Local Government Comments: https://www.fcc.gov/ecfs/filing/6017587248; Local Government Reply Comments: https://www.fcc.gov/ecfs/filing/6017603567.

EXHIBIT N

The City of Puyallup is situated at the foot of Mount Rainier in the Puget Sound region of Washington, 10 miles east of Tacoma and approximately 35 miles south of Seattle. It has a population of approximately 36,300. Puyallup was contacted by both Mobilitie and Verizon Wireless, inquiring about the process for permitting. Because the City's then current regulations did not address small cell siting in the ROW, Puyallup took steps in 2016 to begin the process to amend its regulations in order to facilitate these applications. Specifically, the City joined a consortium of other Washington jurisdictions to work collaboratively to develop model code provisions related to small cell deployment. That consortium has had regular discussions with the various industry providers to attempt to address these issues in a proactive manner, and are developing model code provisions that will hopefully have buy in from both local governments and the industry. There has only been one small cell application filed in Puyallup (on February 27, 2017) to date.

The City of Seattle owns and operates its own electric utility, Seattle City Light ("SCL"). SCL has permitted and seen deployment of over 100 facilities completed in the past couple of years, and has in that time period, permitted applications for about 700 other sites that have not yet been constructed. Inquiries and applications have come from Verizon, Crown Castle, T-Mobile, Extenet, WAVE/Astound Broadband, Comcast, CenturyLink, AT&T, Sprint, and more recently, Mobilitie. These requests can also include associated fiber and electric installations, pole replacements and installation of new poles. In addition to permission for attachments to SCL poles, permits are required from the Seattle Department of Transportation for any work done in the ROW. Recent permitting data from Seattle's Department of Construction and Inspections shows applications at least since Spring 2015, through 2016 and into 2017. In addition to this

recent activity, it is important to note that Seattle has been working with industry to site small cell facilities since 2005 when Crown Castle began small cell installations. Seattle currently has agreements in place with Crown Castle, Verizon, Extenet, Mobilite, Zayo, and AT&T.

The City of Wheat Ridge, Colorado, is a first tier suburban community, located just west of Denver, with a population of approximately 31,360. The City was contacted by Mobilitie about its interest in deploying small cells in the ROW in the fall of 2016. The City amended its code in November 2016 to help facilitate deployment of this kind of infrastructure. The City has not heard back from Mobilitie since that time and no applications for siting small cell facilities have been received.

The City of Westminster, Colorado is located north and west of Denver, with a population of approximately 107,000. The City was approached by Mobilitie in May 2016 and Verizon in January 2017. Westminster requested additional information from Mobilitie, including more detailed information about its proposed siting locations, a copy of an agreement it said it had with the Colorado Department of Transportation granting permission to site facilities on state-owned roads located within the City, and copies of the attachment agreement it said it had with the local investor-owned utility, Public Service Company of Colorado. To date, Mobilitie has not returned with the requested information, although it has indicated that it in fact does not have an agreement with Public Service Company to attach to the utility company's light poles. As discussed in more detail below, a concern of both local government and the wireless industry are utility company pole owners that will not permit small cell facility attachments.

The City of Arvada, Colorado is located on the northwest side of Denver, and is home to approximately 115,000 people. Arvada has comprehensive code provisions about siting wireless

facilities, but the code did not specifically address small cells in the ROW. The City began the process to amend its code in late 2015 and completed it in July 2016. In May 2016 it met with Mobilitie and was presented general information about plans to locate facilities in the ROW. The City followed that meeting up with a letter asking follow up questions. The City received some partial answers from Mobilitie shortly thereafter, but Mobilitie has made no further contact with the City about siting small cell facilities in Arvada. In early 2017 Arvada received preliminary communications from Verizon about siting small cell facilities in the ROW and looks forward to engaging in that process with Verizon, beginning with a meeting scheduled for March 9th.

The Town of Bayfield is located in southwestern Colorado, not far from the Four Corners of Colorado, New Mexico, Arizona, and Utah. The Town sits at an elevation of about 6900 feet, is home to approximately 2300 residents and acts as the commercial and cultural center for eastern La Plata County. Bayfield prides itself on its small town atmosphere and long-standing sense of community. Bayfield's experience demonstrates that there are far more important factors to the industry than the local regulatory process and the fees charged, when deployment decisions are made. In fact, Bayfield is an example of how industry deployment is leaving rural America behind, regardless of the local regulatory framework. Bayfield has had no contact from any entity seeking to deploy small cell facilities.

The City of Thornton, Colorado is the largest suburban community due north and east of Denver, with a population of approximately 134,000, and a large amount of undeveloped land that will accommodate significant future growth. In the past year, Thornton has been approached by Mobilitie and Verizon about the possibility of siting small cell facilities in the ROW. Thornton's land use and ROW regulations do not precisely cover these kinds of facilities, so the City has

begun the process to review and draft amendments to its code to facilitate deployment of small cells, with a goal of having the new provisions in place by late Spring.

Located on the south side of the Denver metro area, the City of Lone Tree is home to approximately 13,500 people, and has a focus on regional transportation investments, including the extension of light rail transit, which helps the City achieve a more efficient multimodal network. Its proximity to Interstate 25 and Colorado Highway 470 (the metro area beltway) puts Lone Tree at the center of significant commerce. Like many of its neighbors, Lone Tree's regulations do not specifically address small cell facilities in ROW. Lone Tree was contacted by Mobilitie in July 2016 and Verizon in December 2016 about the possibility of deploying small cell facilities in the City. Lone Tree plans to utilize the updated CCUA model agreement, as well as collaborate with its south metro area neighbors to assist in the timely deployment of small cell facilities in the ROW.[9]

Tacoma, Washington is a community of approximately 200,000 people situated on the Puget Sound in the Pacific Northwest. It has been contacted by four companies about siting small cell facilities over the past year – Extenet in March 2016, Mobilitie and Verizon in August 2016, and Crown Castle in January 2017. The City does have code provisions that provide a process for negotiating access to the ROW for these facilities, and it has been in negotiations with each company since being contacted about deployment options.

Aurora is Colorado's third largest city, covering an area over 150 square miles, with a diverse population of more than 351,000. In 2016 it was contacted first by Mobilitie and then by

[9] *See*, Section III A, *infra*.

Verizon, about siting of small cell facilities in the ROW. Active negotiations with both entities have been underway for the past few months. Aurora is close to completion of a master license agreement with Mobilitie, which will provide a streamlined process for individual site licenses for each individual ROW site requested. Similar negotiations with Verizon are expected to be completed within the next two to three months, and will follow a similar framework, providing a process for obtaining individual site licenses on any site that is being sought for deployment, subject to local code requirements governing matters like building and safety codes, and consistency with zoning district height limitations.

King County, Washington was approached by Mobilitie and Verizon in 2016. The County's regulations are already technology agnostic, addressing all wireless operations including satellite and microwave. Recent regulatory amendments work well for the County, and create a framework for addressing small cell technology as well as other wireless technology. There has not been much forward movement on the inquiries from these two companies in King County, in part due to other pressing obligations of the County's limited staff, but more directly due to the companies' lack of communication on a desire to move forward. When an applicant is ready to move forward in King County, the County will be ready to proceed.

Lafayette, Colorado is a suburban community in Boulder County with a population of approximately 27,000. Interestingly, Lafayette notes that when it was requested to permit wireless antenna attachments in the ROW in 2001 and 2003 from companies known as Metricom and Ricochet, it did so easily and timely. Both companies went bankrupt, leaving shoebox size

attachments abandoned on poles throughout the City.[10] Despite its status as a thriving suburban community in a very high-tech county, no entity has approached Lafayette in the recent past, seeking to place small cell facilities in the ROW.

These examples demonstrate that in the majority of cases, the interest by the industry in siting small cell facilities in the ROW is relatively new. Many communities do not have code provisions in place in which these kinds of facilities cleanly fit. However, as described here and below in Section III, these same local governments are working proactively to modify local regulations to address small cell siting issues in a reasonable manner.

2. Local Framework for Processing Applications

i. Fees. Permit fees in each of the Local Government jurisdictions are intended to address cost recovery. State law in Washington, New Jersey and Colorado does not allow for franchise fees or similar compensation for permission to use the ROW for this kind of deployment, although a site-specific charge or an attachment fee to municipal infrastructure may be permitted. In Seattle, there are approximately 110,000 utility poles owned in whole or in part by the City, which are available for attachment for wireless siting. Seattle City Light, which has jurisdiction over the poles, charges a $300 application fee per site for time and materials, and $1,800 annually per site, which is the fair market value of the utility's vertical real estate. For poles in the City's ROW, Seattle's Department of Transportation also requires a street use permit, and charges a nominal issuance fee of $209.

[10] Metricom and Ricochet had similar deployments and similar abandonment of facilities widely throughout metro Denver at that time. Some of the abandoned equipment exists even today.

EXHIBIT N

In Wheat Ridge, the City maintains a building permit fee schedule, and wireless providers follow the same schedule as other kinds of structures and attachments. When special use permits are required (for example, for freestanding towers) there is a $200 application fee and a site plan fees of $200. In Tacoma, a refundable application fee of $5,000 is collected at the time the application is submitted to the City. The application fee is to recover the cost of the Tacoma employee time spent for reviewing, researching, presenting, and processing the application. Any funds remaining are returned to the provider upon completion of the application process. In Grand Junction, Colorado, permit fees are also tied directly to its costs incurred in addressing the application. It is considering a Mobilitie proposal to additionally pay a fee of $200 per pole, per year for its small cell sites. Thornton currently charges a $250 inspection fee and is exploring the most efficient way to identify other city costs in the process and will update their fee schedule going forward. Many of these Local Governments, like Thornton, are examining their fees in the same manner they are examination their review and approval processes, in order to make appropriate adjustments in order to limit the fees charged to recovery of the Local Governments' actual costs in addressing these permits.

ii. Timing. Many of the Local Governments are still in the process of completing a master license or similar agreement with the entities that have approached them and expressed a serious interest in deploying small cells in the ROW. Once these agreements are complete, it is expected that individual site applications will take no longer than a few weeks. Seattle's Department of Construction and Inspections has reviewed approximately 43 applications (of which 7 are pending) for facilities on SCL utility poles in the last 2.5 years. The average time for review and approval for wireless attachments to poles in the City of Seattle ROW is two

months.

iii. Specific Local Government Experiences. The experiences of these Local Governments seem to fall into one of two categories. The first is those few jurisdictions that have code provisions specifically addressing small cell siting and that have worked with the industry to site these facilities for a number of years. Most of the Local Government jurisdictions however, find themselves working sometimes independently and sometimes in collaboration with wireless providers, to enter into master agreements that will create a framework for future siting activity. These experiences, in places like Aurora and Grand Junction, are basically working well. There are admittedly times where the City may take a few weeks more than expected to address the next steps in negotiations, and other times where the provider takes a few weeks more to respond. These gaps are indicative of parties that are busy with multiple obligations, and do not demonstrate an intent by either party to delay activities that will lead to a final agreement. In almost all of these cases, no siting application has formally been made, so there is no shot clock requiring a decision in a specified time. Rather, the parties are taking the time necessary to put the right kind of foundation in place for effective deployment activities in the future.

Seattle's interaction with small cell companies has varied. Mobilitie met with Seattle representatives for several months before it finally submitted a term permit application. The City facilitated meetings with Mobilitie several times to speak with a changing list of Mobilitie contacts, and repeatedly explained the application and permit process. Crown Castle submitted an application on January 28, 2017. The City has also been meeting with Comcast, Verizon and CenturyLink on their system upgrade work that may include small cell technology. Seattle meets with Verizon weekly, and Comcast and CenturyLink as requested.

Tacoma reports that it has experienced multiple providers failing to supply proper information on their applications, resulting in a delay in the review and acceptance process. The City's requests for and ultimate receipt of the proper information has been pursued by the applicants on a piecemeal basis over the course of a number of months. Mobilitie changed staff members multiple times during Tacoma's negotiations and many of the new staff members had no knowledge of parties' prior progress, which caused delays in the on-going negotiations.

III. PROACTIVE STEPS TAKEN BY LOCAL GOVERNMENTS TO ADDRESS SITING OF SMALL CELLS

A. Why This is Both a Concern and an Opportunity for Local Governments

As noted above, Local Governments understand the importance of broadband deployment in their communities. Robust wireless and wireline networks are essential to address issues like health care delivery, education, closing the homework gap, job development, and the ability to gather the data necessary to truly become smart communities. Unlike the Commission and the industry, whose primary goal is to see these networks deployed as quickly and at as minimal cost as necessary, local elected officials must balance this critically important goal with the hundreds of other issues they are responsible for – including, transportation, parks, public safety, water and sewer infrastructure and services, education, social services, the arts and many others.

Like industry and like the Commission, local governments have limited staff and budgets. We understand that the industry's capital budgets may be stretched, just as with local government budgets. That explains why, in a suburban community of 115,000 people like Arvada, Colorado, with significant density in the Denver – Boulder corridor, there are many parts of the City that barely get 3G coverage today. It makes it difficult to accept that the Commission is seriously

considering whether to preempt local control in order to facilitate "the promise" of 5G, when we barely have 3G today. Keep in mind that this is the situation in built out suburban communities. In rural Washington, Colorado, New Jersey, and all across rural America, it is much worse.

Problematically, when industry seeks federal restrictions on local authority, as Mobilitie has done in this proceeding and as the Commission suggests may be coming as a follow up to the PN, there is no *quid pro quo*. If the industry was approaching local governments and *promising more network deployment in specific communities*, in return for minimizing fees or speeding up application processes, these discussions might make sense. If the many requests that the wireless industry is making today for state legislative preemption of local authority was coupled with a promise that if such bills are passed, the companies would be legally bound to invest a certain percentage more next year than they did the past year in network deployment, and that a significant percentage of that increased amount would be in rural parts of each state, that would be a discussion worth having. But at this point, state or federal preemption of local authority leads to only one certain outcome – a reduction in the cost of doing business for an industry given special treatment. State preemptory laws may lead to more network deployment, but that deployment may come in another state. State and federal rules that restrict local authority could also result in only minimal increases in the speed of network deployment and significantly larger profits for shareholders. Those are not necessarily bad things for the industry or its shareholders. But for local governments, these debates, which have gone on in similar contexts with the industry for years, are only guaranteed to result in one outcome – restrictions of traditional areas of local authority with no assurance that those local authorities will see a benefit anytime in the near future.

Moreover, while these and many other Local Governments are working proactively to find ways to promote deployment, it is important to understand where the idea of installing new, stand-alone poles in the ROW fits within good land use planning principles. The short answer is nowhere. In almost every new development and redevelopment, utilities are placed underground. The only above ground facilities are street lights and traffic signal poles. Local Governments are very concerned about a proliferation of poles and associated support equipment in the ROW, and therefore we generally support collocation wherever feasible. Problematically, many of the light standards in the United States are not owned by the government. They are owned by private, investor-owned utilities and electric cooperatives. Some of these companies work well in making existing vertical infrastructure available for small cell siting. Others however, have refused to allow small cell facilities on their light poles. Where this occurs, the ability for local officials to plan properly for their communities becomes infinitely more challenging.

It is for these reasons that we will conclude by suggesting that the Commission play a more active educational and advocacy role between wireless industry, electric utilities, and State, local and Tribal governments to address these challenges. Adoption of preemptory rules that have no guaranty of additional network investment in those parts of the country that need it most will not be a helpful way to address our mutual goal of more network deployment.

B. CCUA

Since its inception, CCUA has developed model franchises, model code provisions and model agreements, as recommended documents to be used by its members to save time and resources in their work with the communications industry. The CCUA model cable franchise with Comcast has been utilized by numerous jurisdictions in Colorado and elsewhere. Working

with the model agreement from CTIA, PCIA, NATOA, NLC and NACO, the CCUA developed model code provisions for adoption by Colorado jurisdictions implementing the Commission's rules interpreting the requirements of the Middle Class Tax Relief and Job Creation Act of 2012, 47 U.S.C. § 1455(a)). Recognizing that small cell technology was coming, CCUA developed a model agreement for permitting small cell facilities in the ROW in January 2016. Much of the detail in that model is taken from Verizon's well documented and well received agreement with the City of San Antonio, Texas.

After Mobilitie approached Aurora, Colorado, the City took the CCUA model and incorporated into it a number of its provisions from its standard ROW permit and license document, in order to make a more specific and comprehensive document for licensing small cell facilities in the ROW. That agreement is about 90% complete. Once finalized, the Aurora document will be made generic, and distributed to other communities, to utilize in their discussions with Mobilitie. Similarly, Aurora will be completing its master license agreement with Verizon shortly, and that agreement too will be made generic for use by other CCUA jurisdictions. These model agreements, which no community is required to use, have become very helpful foundational documents, saving time and money for both the local government and the industry, in moving forward with agreements to facilitate small cell deployment.

CCUA members like Arvada and Edgewater, Colorado deserve credit for examining their codes *before* being approached by small cell companies, and developing the framework for efficiently dealing with this emerging infrastructure. When Arvada was amending its code, it specifically invited all of the providers of personal wireless services to attend its public meeting before the code revisions were drafted, in order to provide industry input. It also invited

attendance at its Planning Commission and City Council meetings where those code provisions were reviewed and ultimately approved. None of the providers, except for Verizon, attended and participated. To its credit, while not all of Verizon's suggestions for the code revisions were accepted, some were, and the collaboration between industry and government in that instance made for a better final product.

In Grand Junction, the City developed a Wireless Master Plan with a consultant (CityScape), and to implement that Plan amended the use-specific standards applicable to telecommunications in the Zoning and Development Code. This involved an approximately year-long process with several open houses to which the industry and community were invited to help develop the plan and regulations. The plan and regulations have been so far well received by the community and by the industry. Grand Junction has good working relationships with Verizon and with SBA in connection with their ongoing siting discussions. Mobilitie is a new player for the City, and the parties are working cooperatively on a license agreement.

C. Puyallup, Washington

As noted above, concurrent with Puyallup's efforts to draft code and policies specific to siting small cells in the ROW, Puyallup joined a consortium of cities in Washington dealing with the same issues, and retained outside legal counsel to help the members of the consortium through the process.[11] The new ordinance provisions will be brought forward in Puyallup for approval beginning in late March.

[11] The consortium includes the Washington jurisdictions of Bellevue, Redmond, Kent, Mountlake Terrace, Kirkland, Renton, Issaquah, Puyallup, Walla Walla, Spokane Valley, Gig Harbor, Mukilteo, Mount Vernon, Ellensburg, Richland, Bremerton, Oak Harbor, Bothell, Snohomish, Lake Stevens, Des Moines, Shoreline, Stanwood, Federal Way, and Burien.

D. Seattle

Seattle recently entered into an agreement with Comcast to fund additional staff to compensate for the increased number of permit volumes the City will need to process for their anticipated upgrade work. The City has made similar proposals available to other companies, although to date, only Verizon has indicated a willingness to consider this kind of an arrangement.

E. Tacoma

Tacoma Public Utilities has recently developed a construction standard for small cell installation on power poles. In addition, the City is in the process of developing a master pole attachment agreement specific to wireless attachments and is concurrently in the process of developing a fee schedule. Once all are complete, the City and wireless providers will be able to more efficiently and effectively process permit applications for small cell facilities in the ROW.

IV. PROACTIVE STEPS THAT CAN BE TAKEN BY THE COMMISSION

A. Work More Closely with the Intergovernmental Advisory Committee

As noted above, the Commission has appointed an Intergovernmental Advisory Committee, comprised of State, local and Tribal officials from all parts of the country, representing jurisdictions of all sizes. The IAC paper on siting wireless facilities should be a valuable source of information for the Commission, yet it was essentially ignored in the PN. In that paper, the IAC noted how the Commission can be more helpful to local governments in their siting decisions if the Commission had data on where facilities were sited and could make a database of potential locations available to all governmental entities as well as the wireless

industry.[12] The IAC also recommended efforts that can be undertaken to minimize the coverage gap,[13] and recommended four principles to guide the Commission's actions in this area.[14] We commend this work to the Commission.

B. Address Issue of Siting Small Cells on Utility Company Infrastructure

While some street light poles and electric distribution poles are owned by local governments like SCL and TPU, many are owned by private investor owned utilities and cooperatives. Of these, some entities owning this infrastructure have been quite cooperative in allowing small cells to be located on their existing vertical assets in the ROW. Others however, have refused. In Colorado for example, a rural cooperative, Sangre de Cristo Electric, informed the undersigned in late 2015 that it had no interest in allowing small cells on its existing poles. The state's largest electric utility, Public Service Company of Colorado, d/b/a Xcel Energy, has been asked by multiple wireless providers for permission to attach small cell facilities on existing street light poles, and has refused. It is our understanding that at the time of the filing of these Comments, Public Service Company is reconsidering its position. The CCUA is hopeful and cautiously optimistic that such agreements can be voluntarily finalized. There is no guaranty however, that a timely and reasonable solution will be forthcoming, and the Commission should explore whether it should mandate pole attachments for small cells as it does for wireline facilities. The Commission can also serve an important role in educating and advocating to these entities to encourage more facilities that are *not* owned and/or controlled by local governments to

[12] *See*, Note 6, *supra.*, at pp. 15-16.
[13] *Id.*, at p. 18.
[14] *Id.*, at pp. 20-21.

be made available for wireless deployment purposes.

V. FAULTY PREMISES UNDERLYING MOBILITIE'S PETITION

A. Mobilitie's Initial Problems with its Filings were of its Own Making

We recognize that Mobilitie does not speak for the wireless industry, yet it is Mobilitie's petition that has led to this PN. Mobilitie has made great strides in attempting to work collaboratively with local government entities, since it first began expanding outside of its California footprint. However, many of its initial problems, and the delays caused as a result, were of its own making. Mobilitie created multiple subsidiaries with misleading names which made it look like it brought to prior state or federal approval to its siting applications. These entities had names like Colorado Exchange Facilities Network, LLC and Interstate Transport and Broadband. Mobilitie represented to local jurisdictions, in writing, that they were a regulated public utility, yet they had no certificated authority from the Colorado Public Utilities Commission as such.

Mobilitie initially represented to multiple Colorado jurisdictions that it had a pole attachment agreement in place, allowing it to attach its antennas to street lights owned by Public Service Company of Colorado. It did not. It represented that it had an agreement in place with the Colorado Department of Transportation to locate facilities in State-owned ROW within municipal or county boundaries. It did not. It later represented that such an agreement was "in the works," yet to date, none of the Local Governments from Colorado filing these Comments have received a copy. These kinds of representations resulted in many follow up questions seeking more specific information to back up the claims, which in turn led to delay on Mobilitie's part before it acknowledged the true status of the information being provided for local

government consideration.

In New Jersey, Mobilitie obtained a Certificate of Public Convenience and Necessity from the State's Board of Public Utilities ("BPU"), but questions were raised about the manner in which Mobilitie was seeking permission to locate facilities in various jurisdictions. After meeting with the BPU, in a letter dated December 2, 2016, Mobilitie indicated,

> Mobilitie has decided to obtain a franchise agreement under its CPCN with each jurisdiction in which it seeks to deploy facilities. Mobilitie expects to file the first group of franchise agreements for BPU approval as soon as practicable. We look forward to working with the BPU to expedite approval of these agreements. However, where Mobilitie already has approved agreements/permits in place, Mobilitie anticipates continuing the approved facility deployment while it obtains approval of a franchise agreement. The parties expended time and resources negotiating these agreements and coordinating installation of facilities, so it would be an inefficient use of resources to eliminate these arrangements entirely.

What is interesting about these representations is the attachment to the letter indicating that Mobilitie already had agreements in place with no less than New Jersey 34 municipalities and counties. This belies Mobilitie's claims that localities are delaying the process. Moreover, since that letter, we are unaware of any franchise agreement Mobilitie has proposed for additional jurisdictions in New Jersey. There is no evidence of excessive costs or procedural delays caused by local jurisdictions in connection with Mobilitie's New Jersey siting activities.

As noted above, in most places negotiations with Mobilitie are working better today than when Mobilitie first began its nationwide expansion, and the reasons for the earlier delays cannot in any sense be blamed on local regulatory processes.

B. Any Allegations of Local Government Bad Actors Where the Specific Jurisdictions are not Named in the Mobilitie Petition or in any Comments or Reply Comments, Should be Ignored by the Commission

It has become common practice in many Commission filings complaining about the alleged practices of local governments, to fail to name the specific entities being referenced. These kinds of anecdotal allegations that provide the allegedly offending party no opportunity to respond are offensive to the notions of due process, and should be ignored by the Commission.

It is important to note in Mobilitie's petition just how blatant this failure of due process is. Mobilitie acknowledges that many jurisdictions are in fact, working reasonably and collaboratively with it to promote network deployment. When commenting on jurisdictions that are doing "the right thing" Mobilitie mentions them by name.[15] Mobilitie then proceeds to allege that other localities are charging "exorbitant fees," that they "discriminate against wireless technology," and that the fees are "materially higher than what other rights of way users have been charged."[16] These alleged bad actors cannot respond, because Mobilitie fails to name them. Perhaps there is another side of the story that would portray the real facts in a different light.

Mobilitie then spends three pages of text in its Petition criticizing application fees, new pole fees, attachment fees, and percentage of revenue fees imposed by "a Minnesota locality," "a California city," "a Wisconsin city," "two Oregon cities," "one California city," "two other California cities," "a Texas locality," "an Illinois jurisdiction," "a New York locality," "localities in Oregon and Washington," "jurisdictions in California, Massachusetts, and New York, as well

[15] Mobilitie, LLC Petition for Declaratory Ruling, November 14, 2016, WT Docket No. 16-421, p. 14, naming Los Angeles and Anaheim, California; Minneapolis, Minnesota; Overland Park and Olathe, Kansas; Independence, Missouri; Newark and Union City, New Jersey; Bismarck, North Dakota; Price, Utah; and Racine and Wauwatosa, Wisconsin.
[16] *Id.*

as other jurisdictions in Oregon," "several Texas cities," and the all-inclusive "some localities."[17]

What does Mobilitie fear about giving these communities the opportunity to defend themselves against its allegations? Perhaps an explanation from these communities might actually lead to the data driven record that the Commission has expressed an interest in developing in this docket. In short, all such allegations where an accusing party fails to name the parties it is complaining about should be ignored. Notice and comment means nothing if notice to the parties whose acts are alleged to be the basis for the relief requested is not provided.

VI. CONCLUSION

The effort to deploy small cell facilities in the ROW is a relatively new phenomenon. For that reason alone, it is far too early for the Commission to consider moving toward federal, one-size-fits-all rules that preempt local authority related to managing the ROW for these facilities. Moreover, state legislatures all across the country have either adopted or are considering new legislation to address how these issues are addressed by the political subdivisions of each state. It remains to be seen what impact state legislation will have on deployment.

There are at least three other reasons that the Commission should not proceed with federal rules governing ROW access for small cells. First, the vast majority of the over 36,000 units of local governments in the United States that have been asked for permission to site these facilities are working cooperatively with the industry to accomplish the requests in a way that meets the legitimate needs of all parties. In the unlikely event that the record in this Docket includes allegations against 300 *specifically named* local governments that do not refute the charges, this would amount to less than one percent of all local governments in the nation. Such evidence

[17] *Id.*, at pp. 16-19.

would be wholly insufficient to support adoption of federal rules that preempt traditional areas of local control.

Second, and as we expect to be addressed by our national local government associations and a number of local government commenters in this Docket, the Commission has limited legal authority to act to preempt local authority and restrict the kinds and amounts of fees that can be charged of private entities that seek to use local government property for their business operations.

Third, the specific evidence the Local Governments have provided in these Comments demonstrate that the industry and local governments are working together well in those communities where small cell siting requests are being made. Where permits are not immediately granted, it often stems from the fact that an interested industry party has not followed up on preliminary inquiries. In many cases, the industry and local government is working together both on individual siting requests and on model agreements that will facilitate deployment on a broader scale. These model agreements are often effective region-wide or in large parts of a state, but there is no evidence that what works best in New Jersey will work equally as well in Washington. The bottom line is that there is no widespread national problem that is calling out for federal rules governing ROW access.

The Commission can continue to play an important role, as it has in recent years, in bringing the parties together, encouraging educational and collaborative efforts, and in doing so, we strongly urge the Commission to rely upon the expertise and advise of its Intergovernmental Advisory Committee. In addition, given the vast number of utility poles that exist in the ROW that are not owned by local governments, to the extent that the Commission does anything

proactive in this area, it should consider ways to make those non-government owned poles made available for wireless deployment. The Commission should not take further action as a follow up to this Docket related to one-size-fits-all federal rules governing access to local ROW for wireless network deployment.

Respectfully submitted this 8th day of March, 2017.

THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF TACOMA AND SEATTLE, WASHINGTON, KING COUNTY, WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

Kissinger & Fellman, P.C.

By: 

Kenneth S. Fellman
3773 Cherry Creek North Drive, Suite 900
Denver, Colorado 80209
Telephone: (303) 320-6100
Facsimile: (303) 327-8601
kfellman@kandf.com

EXHIBIT O

Letter from Douglas J. DeBord, County Manager, Douglas County, Colorado, to Marlene H. Dortch, Secretary, FCC (Aug. 21, 2018)

In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

[appears behind this coversheet]

EXHIBIT O

DOUGLAS COUNTY
COLORADO

Office of the County Manager

www.douglas.co.us

www.douglas.co.us

August 21, 2018

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development, WT Docket No. 17-79; In the Matter of Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling, WT Docket No. 16-421*

Dear Ms. Dortch,

Please accept this letter for filing in the above-referenced dockets on behalf of Douglas County, Colorado. Douglas County (the "County") is located in the South Denver-Metro area and is the centerpiece of the Denver/Colorado Springs development corridor. The County prides itself on its ability to work cooperatively and efficiently with business interests for the betterment of the County, and that cooperative relationship has historically included working with the telecom industry to facilitate greater access to wireless communications service throughout the County. While the County has typically found applicants to share its goals of cooperation and expediency, it regretfully found the opposite to be true with respect to a § 6409(a) application submitted by Crown Castle last year. Although the County worked diligently to provide an appropriate avenue for the applicant to secure facility upgrades, and remains willing to do so, Crown Castle's conduct has spurred needless conflict and delay. The County is filing this information to correct misleading information that Crown Castle filed in its letter dated August 10, 2018 regarding its interactions with the County.

Crown Castle and T-Mobile submitted a request for approval of modifications to one of its existing facilities under § 6409(a) in Douglas County in May 2017. The existing facility, which is located near a heavily traveled highway, was initially approved and constructed in 2002 as a stealth design, mirroring existing utility poles in the area. The modifications proposed in 2017 would have more than doubled the width of the upper 10 to 11 feet of the existing 35-foot pole, completely defeating the stealth design of the existing structure.

In June 2017, County staff met with the applicants and informed them that the pending EFR application ***could not be approved*** because it would defeat the stealth element of the pole's

design. At that same meeting, County staff offered multiple suggestions on other avenues, including a site improvement plan, that were available to the applicants to upgrade their facility. Staff's determination, rationale and suggested alternatives were timely issued in writing one week later. Upon receipt of that written determination, the initial application was no longer pending in any respects, and it was up to the applicants to determine if they wanted to proceed with an application under one of the alternative processes suggested by County staff. The applicants chose not to move forward with the proposed alternatives and ceased discussions with the County regarding that facility in July 2017. Under local law, if the applicants wished to challenge the decision of the County to reject the application, they had 30 days from the date of the rejection to do so. No such action was ever filed.

Months later, in late October, County staff received a letter from the applicants' counsel claiming that the County had misconstrued § 6409(a), that the applicants' proposed modifications could not be deemed to defeat the concealment elements of the existing structure, and that the May 2017 application, which was rejected in June 2017, should have been granted. The applicants' counsel disingenuously claimed the letter was being submitted in response to a County request for "additional information" which, in fact, the County never made and would have been untimely even if it had. The applicants' counsel went on to claim that it was "restarting" the 60-day shot clock.

Counsel for the County responded, explaining that there was no pending application for the subject facility that would allow a shot-clock to be "restarted." Shortly thereafter, on December 1, 2017, the applicants' counsel declared their May 2017 application to be deemed granted and insisted that the County file suit if it believed otherwise. Because the applicants' conduct appeared to be a blatantly manufactured attempt to revive the long-elapsed 30-day deadline for challenging staff's June 2017 determination, the County did as the applicants' counsel suggested and filed suit to seek a court determination as to the rights of the parties under these circumstances.

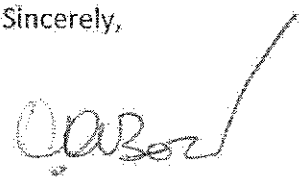
Crown Castle's August 10, 2018 *ex parte* letter is misleading in that it (i) fails to detail the intensity of the "modification" requested and describe how that impacted the County's consideration of whether it would defeat the concealment elements of the approved site (had Crown shared the actual submittal drawings this would have been obvious); (ii) fails to acknowledge that it sat on its rights for four months after the County rejected the application, which under state law terminated its legal ability to challenge the County's action; and (iii) fails to advise the Commission that the County's filing of a declaratory judgment action was not its intention, but rather came as the result of the applicant's counsel's demand that it either accept its twisted and inaccurate description of the facts or file suit.

The County questions how due process requirements are met when Crown Castle can make these misleading allegations against the County as part of its effort to support federal rules

preempting traditional areas of local control without providing the County notice of its claims. Despite Crown Castle's failure to provide notice, the County is providing Crown Castle with notice of this filing. Douglas County, Colorado respectfully suggests that given Crown Castle's misleading claims against the County, and its apparent hope that by failing to advise the County of its claims that the County would be unable to respond, that the Commission refuse to consider those claims in its decision in these dockets. In the case of any jurisdictions that were not provided notice of filings against them alleging actions supporting federal preemption, the County suggests that the Commission reject any preemption ruling unless and until it conducts a more detailed fact-finding effort to ensure that all parties have an opportunity to respond to allegations that are made against them.

Douglas County appreciates the opportunity to set the record straight in connection with Crown Castle's misleading allegations in these dockets.

Sincerely,



Douglas J. DeBord
County Manager

EXHIBIT P

Approval Letter from City of Beaverton, Or., to AT&T (Apr. 9, 2019)

[appears behind this coversheet]

EXHIBIT P

CITY OF BEAVERTON
Community Development Department
Planning Division
12725 SW Millikan Way
Beaverton, OR 97006
General Information- (503) 526-2222 V/TDD
www.BeavertonOregon.gov

WIRELESS FACILITY ONE NOTICE OF APPROVAL

DATE:	April 9, 2019
FILE:	WF2019-0006 – AT&T Collocate
LOCATION:	5250 SW Alger Ave
WASH. CO. TAX LOT:	Map 1S115DB Tax Lot 00400
LEGAL DESCRIPTION:	None Found
ZONE/NAC:	Industrial (IND) / Vose NAC

PROJECT DESCRIPTION:
Wireless Facility One approval includes removal and replacement of six panel antennas and six existing radioheads, installation of three new radioheads on new mounts, removal of six tower mounted amplifiers, removal and replacement of a surge protector, installation of one fiber feeder, and additional equipment work inside of the existing equipment shelter. Refer to the approved narrative and site plans, on file at City Hall.

Velocitel, LLC
Attn..: Natalie Erlund
4004 Kruse Way Place #220
Lake Oswego, OR 97035

Staff has reviewed the above referenced application and finds that the proposal meets the threshold(s) for a Wireless Facility One as defined in the Beaverton Development Code (BDC), Section 40.96.15.1.A. Further, by meeting all associated conditions of approval, attached herein, the proposal will meet the applicable approval criteria identified in BDC Section 40.96.15.1.C. Please review these conditions of approval.

There is a standard twelve (12) day appeal period as stated in BDC Section 50.60. Attached to this letter is an appeal waiver form. Should the waiver form not be completed, this approval shall not be valid until the appeal period has ended and no appeal has been received.

Reviewed by: Brianna Addotta, Assistant Planner
City of Beaverton
Planning Staff

EXHIBIT P

CONDITIONS OF APPROVAL
AT&T Collocate
WF2019-0006

1. The location of the proposed antennas and ancillary equipment shall be carried out in accordance with the narrative description and plans on file at City Hall. (Planning/BA)

2. Wireless Facility One approval shall be void after one year from the date of approval unless substantial construction pursuant thereto has taken place. (Planning/BA)

3. No external mounting of wiring. All wiring and cabling shall be on the interior of the tower. (Planning/BA)

4. Building permits must be secured prior to construction. For further information regarding building permits and/or related building code issues, please call 503-526-2493. (Planning/SD)

5. Erosion Control Best Practices shall be followed. (Site Development/JDD)

6. Any new service lines or affected overhead service lines to the building shall be undergrounded. (Site Development/JDD)

7. All new antennas and equipment shall be installed and maintained in accordance with the original conditions of approval as specified in all previous approvals for this wireless facility, which are still in effect at this time. (Planning/BA)

EXHIBIT P

CITY OF BEAVERTON
Community Development Department
Planning Division
12725 SW Millikan Way / PO Box 4755
Beaverton, OR 97076
General Information- (503) 526-2222 V/TDD
www.BeavertonOregon.gov

TYPE 1 APPLICATION – APPEAL WAIVER

Pursuant to Section 50.35.4 of the City of Beaverton Development Code, I, _____ (**PRINT NAME**), as the applicant for **WF2019-0006 – AT&T Collocate**, hereby announce my intention to not appeal the decision issued by the City of Beaverton Development Services Division for my Type 1 Application. In announcing this intention, and affixing my signature below, I indicate my full awareness and agreement that I am foregoing my twelve (12) day appeal opportunity **that expires on April 22, 2019**, as specified in Section 50.35.3.E of the City of Beaverton Development Code.

_____

(Signature)*

_____

(Date)

*To be signed and dated in the presence of a Notary Public for the State of Oregon.

Subscribed and Sworn to before me this ____ day of _____, _____.

_____

Notary Public for the State of Oregon

My Commission expires: _____

EXHIBIT Q

Affidavit of Karen Lynch

[appears behind this coversheet]

EXHIBIT Q

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250
	)	RM-11849
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

AFFIDAVIT OF KAREN LYNCH

Karen Lynch declares as follows:

1. Since August 10, 1987, I have been employed by the City of San Diego. I began as an Associate Planner, promoted to Senior Planner and in 2007 I became a Development Project Manager 3.

2. My duties as a Development Project Manager include the intake and review of applications for new, collocated and modified personal wireless service facilities.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The WIA petition for declaratory ruling alleges that the City of San Diego requires a radio frequency report for local approval before it will consider an eligible facility request. The City of San Diego requires applicants to submit a radio frequency report with an application that demonstrates the proposed facility will comply with the FCC's guidelines for RF exposure. The City of

EXHIBIT Q

San Diego does not require the radio frequency report for "local approval." Rather, it requires the radio frequency report in order to determine whether the eligible facility request comports with federal requirements concerning radio frequency. An eligible facility request that comports with federal requirements concerning radio frequency will not be denied based on the radio frequency report.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at San Diego, on October 24, 2019:

Karen Lynch
Development Project Manager
City of San Diego

EXHIBIT R

Affidavit of Joseph Lim

[appears behind this coversheet]

EXHIBIT R

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250
	)	RM-11849
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

AFFIDAVIT OF JOSEPH LIM

Joseph Lim declares as follows:

1. Since April 26, 2018, I have been employed by the City of Solana Beach as Director of Community Development.

2. My duties as Director of Community Development include the intake and review of applications for new, collocated and modified personal wireless service facilities.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The WIA petition for declaratory ruling alleges that the City of Solana Beach requires a radio frequency report for local approval before it will consider an eligible facility request. The City of Solana Beach requires applicants to submit a radio frequency report with an application that demonstrates the proposed facility will comply with the FCC's guidelines for RF exposure. The City of Solana Beach does not require the radio frequency report for "local

approval." Rather, it requires the radio frequency report in order to determine whether the eligible facility request comports with federal requirements concerning radio frequency. An eligible facility request that comports with federal requirements concerning radio frequency will not be denied based on the radio frequency report.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at City of Solana Beach, on October 23, 2019:

Joseph Lim
Director of Community Development
City of Solana Beach